84-1559

Office-Supreme Court, U.S.
FILED
MAR 29 1985
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1984

UNITED VAN LINES, INC.,
Petitioner

vs.

JAMES K.T. HUNTER and
GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

GROVER A. PERRIGUE, III
JAMES CLARK LEECH
JANICE E. HARDIN
3452 East Foothill Boulevard
Suite 400
Pasadena, California 91107
(818) 449-1732

Attorneys for Petitioner.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

197 18

QUESTIONS PRESENTED

1

Is a $5,000,000.00 suit for emotional distress and punitive damages against an interstate motor carrier for alleged "fraud" and "bad faith" in conducting its federally regulated investigation and adjustment of a 49 U.S.C. § 11707 (Carmack Amendment) cargo damage claim, a suit arising under "an Act of Congress regulating commerce", within the meaning of 28 U.S.C. § 1337?

2

If so, can the Ninth Circuit apply the $10,000.00 jurisdictional threshold provided by 49 U.S.C. § 1445 to deny United Van Lines its right of removal to Federal Court merely because the shipper's claim for actual damage to cargo was admittedly worth no more than $3,000.00?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
STATEMENT OF JURISDICTIONAL GROUNDS	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	10
1	
INTRODUCTION	10
2	
ALL OF HUNTERS' CLAIMS ARISE UNDER FEDERAL LAW	10
3	
FEDERAL LAW IS CONTROLLING IN THIS CASE — NOT "INSIGNIFICANT"	12
4	
FEDERAL UNIFORMITY EMBODIED IN THE INTERSTATE COMMERCE ACT COMPELS A FINDING OF JURISDICTION OVER "BAD FAITH" CLAIMS	14
5	
CONCLUSION	16

INDEX TO APPENDICES

APPENDIX A. Opinion of the Ninth Circuit Court of Appeals	App. p. A-1
APPENDIX B. Order. Petition for Rehearing Denied	B-1
APPENDIX C. Opinion of the Ninth Circuit Court of Appeals	C-1
APPENDIX D. Reinhardt, Circuit Judge, Dissenting	D-1

Table of Contents

	Page
APPENDIX E. Order. Opinion Filed June 25, 1984 Is Vacated	E-1
APPENDIX F. Order. Summary Judgment	F-1
APPENDIX G. Order. Partial Remand	G-1
APPENDIX H. Memorandum and Order	H-1
APPENDIX I. Minute Order	I-1
APPENDIX J. Judgment in Favor of Defendant United Van Lines, Inc.	J-1
APPENDIX K. Pertinent Statutes Involved	K-1
APPENDIX L. Complaint for Damages for Breach of Written Contract, Tortious Bad Faith, Intentional Interference With Contractual Relations, Fraud and Intentional Infliction of Emotional Distress and for Award of Attorneys' Fees Pursuant to 49 U.S.C. Sec. 17711	L-1
APPENDIX M. Tariff No. 400-A	M-1

TABLE OF AUTHORITIES

Cases	Page
Adams Express Co. v. Croninger, 226 U.S. 491 (1913)	7
Atchison and Topeka S. Ry. Co. v. Springer, 172 F.2d 346 (7th Cir., 1949)	15
Bell v. Hood, 327 U.S. 678 (1946)	7
Franchise Tax Board v. Construction Laborers Vacation Trust, 103 S.Ct. 2841 (1983)	11
Masonite Corp. v. Pacific Gas & Electric Co., 65 Cal. App.3d 1, 135 Cal.Rptr. 170 (1976)	12, 13, 14
Seaman's Direct Buying Serv. v. Standard Oil, ___ Cal. 3d ___, 206 Cal.Rptr. 354 (1984)	13, 14
Thurston Motor Lines, Inc. v. Rand, 103 S.Ct. 1343 (1983)	9, 11
Federal Regulations	
Code of Federal Regulations, Title 49, Sec. 1005	3, 15
Code of Federal Regulations, Title 49, Sec. 1307(D)	3
Statutes	
United States Code, Title 28, Sec. 1254(1)	3
United States Code, Title 28, Sec. 1331	12
United States Code, Title 28, Sec. 1337	i, 3, 4, 10, 12
United States Code, Title 28, Sec. 1441	3
United States Code, Title 28, Sec. 1445	i, 3, 4, 6
United States Code, Title 28, Sec. 1445(b)	2, 7, 9
United Staes Code, Title 49, Sec. 20(11)	3
United States Code, Title 49, Sec. 10730	3
United States Code, Title 49, Sec. 10761	3
United States Code, Title 49, Sec. 10762	3
United States Code, Title 49, Sec. 11707	i, 3, 4, 9
United States Code, Title 49, Sec. 11711	6

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

UNITED VAN LINES, INC.,[1]
Petitioner,

vs.

JAMES K.T. HUNTER and
GINA F. BRANDT,[2]
Respondents.

PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW

The Ninth Circuit Court of Appeals ("Ninth Circuit") opinion that found federal jurisdicition lacking in this controversy which is the subject of this Petition was officially reported at 746 F.2d 635 (9th Cir. 1984). This opinion is reproduced as Appendix "A" to this Petition. Herein, this decision will be referred to as *"Hunter II"*. *Hunter II* was rendered after the Ninth Circuit vacated its original opinion that found federal jurisdiction to exist. A copy of the Ninth Circuit's first opinion and its order vacating it are reproduced as Appendices "C" and "E" respectively. The original opinion will be referred to herein as *"Hunter I"*.

[1]Additional parties to these proceedings are Trilco, Inc. John Trlica, Crown Transfer & Storage, Belmont Van & Storage Company and John Falbe. All of these parties are alleged to have acted as agents of or conspirators with interstate carrier United Van Lines, Inc. in commiting various alleged wrongs against Plaintiffs.

[2]Respondents James K.T. Hunter and Gina F. Brandt are referred to herein collectively as "Plaintiffs" or the "Hunters".

There are other court opinions pertinent to this Petition. *Hunter I*, prior to being vacated, affirmed an order of the District Court for the Central District of California ("District Court") that granted Petitioner United Van Lines, Inc. ("United") Summary Judgment on the basis that the Hunters' so-called state claims for "fraud" and "bad faith" (the Second through Fifth Causes of Action) were preempted by federal law. This Order of the District Court is referred to herein as the "Summary Judgment" and is reproduced as Appendix "F".

After granting the Summary Judgment, the District Court entered an order remanding the case to State Court on the basis that the amounts in controversy under the remaining claims, i.e., the First and Sixth Causes of Action, did not exceed the $10,000.00 jurisdictional threshold of 28 U.S.C. §§ 1337 and 1445(b). This order is copied as Appendix "G" and referred to as the "Partial Remand".

Following the Partial Remand a judgment in favor of United was entered in State Court. Copies of this judgment and related orders of the State Court (herein collectively referred to as the "State Judgment") are at Appendices "H," "I," and "J". The State Judgment, entered January 20, 1984, disposed of the Second through Fifth Causes of Action on the basis of the Summary Judgment granted in the District Court, which was then being appealed to the Ninth Circuit (see Appendix "J"). While the Hunters claimed in the Ninth Circuit that the Summary Judgment was void for lack of jurisdiction, before the State Court they claimed that the Summary Judgment was binding unless reversed by the Ninth Circuit. The Hunters are currently perfecting an appeal of the State Judgment to the California Court of Appeal, Second Appellate District. It is yet unknown what position the Hunters will take in the

state courts now that the Ninth Circuit has refused to decide the merits of the Summary Judgment.[3]

STATEMENT OF JURISDICTIONAL GROUNDS

Hunter I was filed and entered June 25, 1984. *Hunter II* was filed and entered November 5, 1984. United timely petitioned for rehearing. The Ninth Circuit's order denying rehearing was filed and entered January 29, 1985. The order denying rehearing is copied as Appendix "B". This Court has jurisdiction to review Hunter II under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes and Interstate Commerce Commission regulations are involved in this matter:

Statutes: 28 U.S.C. §§ 1337, 1441, and 1445; 49 U.S.C. § 20(11) (now repealed and recodified); 49 U.S.C. §§ 10730, 10761, 10762, 11707; and 49 U.S.C. § 11711.

ICC Regulations: 49 CFR 1005 (Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims) and 49 CFR 1307 Subpart D (Released Rates).

The pertinent text of each statute and regulation is set forth in Appendix "K". Additionally, the portions of United's ICC-approved tariffs pertaining to release rates and claims adopted pursuant to these statutes and regulations are copied as Appendix "M".

---

[3]Though of necessity the jurisdictional issues discussed here must assume as true the factual allegations of the Hunters, the order of the State Court (Appendix "H") granting United's request for judgment on the First and Sixth Causes of Action sheds light on the real substantive merit to the Hunters' claim, or better, the lack thereof.

STATEMENT OF THE CASE.

This petition seeks to compel the Ninth Circuit to recognize federal removal jurisdiction of the District Courts over claims by shippers against federally regulated common carriers for alleged bad faith in the settlement and adjustment of cargo loss and damage claims. The Hunters' Complaint (reproduced as Appendix "L") was filed in the Superior Court of the State of California in and for the County of Los Angeles. United promptly removed this action to the United States District Court for the Central District of California ("District Court") upon the grounds that the Hunters' claim arose under an Act of Congress regulating commerce within the meaning of 28 U.S.C. § 1337 and, if applicable, the amount in controversy exceeded the $10,000.00 threshold limitation provided in companion section 28 U.S.C. § 1445 for claims under 49 U.S.C. § 11707.

In this regard, Hunters' Complaint alleges that Petitioner United is a common carrier by motor vehicle, authorized as such by the Interstate Commerce Commission (see Paragraph 3 of Complaint, Appendix L2) and that United, in that capacity, breached its written contract of carriage evidenced by the interstate Bill of Lading attached as Exhibit 1 of the Complaint. (See Paragraphs 17-22 of Complaint, Appendix L7-8.) The uniform interstate Bill of Lading, incorporated by reference in the Hunters' Complaint, specifically stated that: "THE RULES, REGULATIIONS, RATES AND CHARGES SET OUT IN THE TARIFF CURRENTLY IN EFFECT ON THE DAY OF LOADING, AS FILED WITH THE INTERSTATE COMMERCE COMMISSION, SHALL GOVERN THIS SHIPMENT."

The Hunter Complaint contains six separately stated causes of action, and their claim of bad faith failure to

settle is first alluded to at Paragraph 17 of the First Cause of Action as follows:

> "United has breached its obligations to Plaintiffs under the contract and 49 U.S.C. § 11707 in that United has offered Plaintiffs $585.50 in full settlement of all claims for damage to the Jukes' damaged household goods, the table and Plaintiffs' additional damaged antiques, despite the fact that the actual value of that damage is in excess of $2,500.00." (Appendix L7)

The Second Cause of Action of the Complaint incorporates this allegation and goes on to allege:

> 27. The Contract, which consists of a preprinted, standardized Bill of Lading drafted by United, was presented to the Jukeses on a take it or leave it basis.
>
> 28. By operation of law there is implied in the Contract a covenant of good faith and fair dealing which, under the circumstances, imposed upon United an obligation fairly to consider, evaluate and pay legitimate claims under the Contract. (Appendix L9)

The Hunters then allege, in conclusionary language, certain evil motives on United's part which they claim led United to offer them $585.50 on a claim they believe worth in excess of $2,500.00. The Hunters' focus centers on an assertion that United in the handling of their cargo loss and damage claim conspired with a furniture repair and restoration concern, Defendant Trilco, Inc., to secure "low ball" estimates and by other intentional misconduct sought to coerce the Hunters into accepting less than they were due in settlement of their claim. The Hunters allege that as a result of this activity they are entitled to recover in excess of $2,500.00 for the alleged damage to their property, $50,000.00 for emotional suffering, attorneys' fees in an unspecified amount and $5,000,000.00 in punitive damages from United. (See Paragraphs 29 and 30 of Complaint,

Appendix L9-18.) The Third Cause of Action (conspiracy to interfere with the Hunters' rights under the interstate Bill of Lading), the Fourth Cause of Action (fraudulent misrepresentations made in the negotiation of the interstate Bill of Lading) the Fifth Cause of Action (intentional infliction of emotional distress) and the Sixth Cause of Action (attorneys' fees under 49 U.S.C. § 11711) all incorporated the same factual allegations.

Following removal to the District Court, United moved for and was granted a partial summary judgment on the Second through Fifth Causes of Action. As to these claims for relief, the Hunters asserted they were not seeking recover under any federal law. Accordingly, the District Court adjudged that any claim under state law for the conduct alleged would of necessity be preempted by the Interstate Commerce Act. (See Appendix "F".) Thereafter, the District Court, on its own motion, remanded the remainder of the action back to state court finding that the amount in controversy under the First Cause of Action (cargo loss and damage) and the Sixth Cause of Action (attorneys' fees under 49 U.S.C. § 11711) did not exceed the $10,000.00 threshold specified under 28 U.S.C. § 1445 for federal jurisdiction. (See Appendix "G".)

The Hunters appealed the Summary Judgment on the Second through Fifth Causes of Action to the Ninth Circuit, asserting that the District Court was caught in an Hobbesian dilemma. Relying on the odd but clearly established principal that a "federal question" defense would not give the District Court removal jurisdiction, the Hunters claimed that the Summary Judgment proved the District Court lacked jurisdiction in the first instance, and therefore the Summary Judgment was invalid and the entire action of necessity had to be sent back to state court. United, on the other hand, contended that Plaintiffs' entire claim for $5,000,000.00 plus arose under an act "regulating com-

merce", and that under the long established rule of *Bell v. Hood* 327 U.S. 678 (1946) the case was properly removed even though the Summary Judgment later determined that Plaintiffs were entitled to recover less than $10,000.00.

In *Hunter I* the Ninth Circuit agreed with United on all points. If the $10,000.00 threshold under 28 U.S.C. § 1445 (b) applied to the "fraud" and "bad faith" claims, it was easily satisfied. As the Ninth Circuit succintly observed:

> "United maintains that the requirements of § 1445(b) are satisfied because the Hunters' causes of action constitute, in effect, a single claim against the common carrier from a single Bill of Lading for more than $5,000,000.00. We agree." (*Hunter I* at Appendix C4-5.)

The Ninth Circuit then affirmed the Summary Judgment on the basis that the Hunters' so-called "state claims" were preempted by federal law. In so doing, the Ninth Circuit followed the consistent holdings of this Court since the subject was first approached in *Adams Express Co. v. Croninger,* 226 U.S. 491 (1913) and observed:

> "Congress intended that the amendment would eliminate the chaotic and inconsistent application of state law and federal common law to interstate cargo shipments. The Carmack Amendment creates a uniform standard of liability for the carrier, because 'the national law is paramount and supersedes all state laws as to the liabilities and exemptions created by such transactions'." (*Hunter I* at Appendix C6.)

After a review of this line of authorities, the Ninth Circuit also rejected the Hunters' claim that their state law claims did not in reality arise under the federal law. As the Court observed on this point:

"Finally, the Hunters' attempt to avoid the preemptive force of *Adams Express* by arguing that because their state law claims do not relate to the actual damage to the property, the Carmack Amendment does not apply. We disagree. First, the state law claims arise from and depend directly on United's alleged breach of its obligations under the Bill of Lading. The Hunters implicitly acknowledge this inasmuch as each of their state law causes of action incorporate the First Cause of Action under the Carmack Amendment . . .

The Hunters essentially argue that United breached its obligations under the Bill of Lading and then refused to settle the Carmack Amendment claim to their satisfaction. Allowing them to pursue tort sounding state law causes of action based on United's handling of the damage claim would frustrate the Carmack Amendment's purpose of bringing contracts for interstate shipments under a uniform rule of law. The Hunters' suggestion that this purpose is served if the Carmack Amendment governs only the carrier's liability for damage to the shipment, leaving the state law the determination of liability for settling a damage claim based on the Bill of Lading, would return us to the pre-Carmack Amendment days of carrier liability . . . We decline the invitation to relive history." (*Hunter I* at Appendix C9-10.)

However, shortly after the decision in *Hunter I* was filed, it was vacated by the Ninth Circuit. The ensuing decision in *Hunter II* did a complete reversal and adopted the Hunters' argument that no federal jurisdiction existed over a claim for "bad faith" conduct of an interstate carrier in failing to settle a Carmack Amendment claim because federal preemption was merely a defense. The Court's decision in *Hunter II* is lengthy and scholarly. It has, how-

ever, one clear and glaring flaw. That is the Ninth Circuit's conclusion that:

> "federal law would play an *insufficiently predominant role* in the resolution of the state claim to give rise to federal jurisdiction over that claim." (Emphasis added.) (*Hunter II* at Appendix A26.)

As will be shown below, Plaintiffs' claim for "bad faith" must exist, if at all, only under federal law and thus federal law is far from insignificant. As the Ninth Circuit was told in *Thurston Motor Lines, Inc. v. Rand,* 103 S.Ct. 1343 (1983):

> *"as to interstate shipments . . . the parties are held to the responsibility imposed by the federal law, to the exclusion of all other rules of obligation."*

The Ninth Circuit seemingly continues to ignore this Court's unequivocal direction to assume jurisdiction in cases arising under the Interstate Commerce Act by engaging in yet another play on words. In *Thurston* the Act was "tangential". In *Hunter II* it is "insufficiently predominant".

Additionally, in refusing to follow the binding authorities of this Court, the Ninth Circuit has created a jurisdictional scheme that can only result in chaos. Under the Ninth Circuit's rationale, the District Courts would have jurisdiction over "bad faith" claims against interstate carriers only if the 49 U.S.C. § 11707 (Carmack Amendment) cargo damage claim exceeds the $10,000.00 threshold amount of 28 U.S.C. 1445(b). Where less than $10,000.00 in property damage is alleged, the Courts of the fifty states will be free to apply their rules of decision to the federally regulated carriers' claims practices. Where the $10,000.00 threshold amount is satisfied, the District Courts will seemingly be required to enforce any pendent "state claim" even though

it imposes greater settlement burdens and obligations than imposed on the interstate carrier by federal regulation. The Ninth Circuit's decision in *Hunter II* assures a new era of chaotic and inconsistent application of state and federal law.

ARGUMENT

1

INTRODUCTION

The jurisdictional issue presented by this petition is of nationwide importance, not only to common carriers regulated by the ICC, but also to shippers with whom they contract. The solution to the jurisdiction issue adopted in *Hunter II* not only destroys the uniformity of regulation sought by the Interstate Commerce Act, it is detrimental to a well reasoned allocation between state and federal courts of jurisdiction to decide important questions of law in the evolving area of tortious breach of contract. Federal law must govern and control the development of any "bad faith" breach of contract theories against defendants whose contractual relationship and claims procedures are regulated and supervised under the Interstate Commerce Act. The Ninth Circuit was clearly wrong in concluding that a claim for bad faith breach of a federally regulated contract does not arise "under an Act of Congress regulating commerce" with the meaning of 28 U.S.C. § 1337. This court must act to reverse *Hunter II* and direct the Ninth Circuit to decide the summary judgment issues on the merits.

2

ALL OF HUNTERS' CLAIMS ARISE UNDER FEDERAL LAW

The law is clear that *"as to interstate shipments ... the parties are held to the responsibility imposed by the federal*

law, to the exclusion of all other rules of obligation." Thurston Motor Lines, Inc. v. Rand, 103 S.Ct. 1343, 1345 (1983). Before the Ninth Circuit United argued that under *Thurston* "federal law displaces the state law Plaintiffs rely on." As was properly concluded in *Hunter I,* the Plaintiffs' claim is "really" one of federal law.

However, the Ninth Circuit blithely side-stepped this crucial issue in *Hunter II.*

Step One: The artful opinion in *Hunter II* recharacterized United's jurisdictional argument to be one of "preemption".

Step Two: The Court misapplied *Franchise Tax Board v. Construction Laborers Vacation Trust,* 103 S.Ct. 2841 (1983) (*"Construction Laborers"*), and found the "Artful Pleading" doctrine inapplicable *because federal law provides the Hunters no remedy.* However, as this Court made clear in *Construction Laborers,* this analysis is only sound if the "law that creates the cause of action is state law" and it never applies if the so-called state claim *"is really one of federal law."* (Emphasis added)

Thus, the Ninth Circuit's reliance on *Construction Laborers* begs the question. A question that is clearly answered by this Court in *Thurston.* Plaintiffs' claim is "really" one of federal law. Additionally, here Plaintiffs have their federal remedy — they just don't want it. The fact that the Hunters shun any claim for "bad faith" under federal law because they prefer state law punitive damage claims has no bearing on whether their claim arises under federal law. Both *Thurston* and *Construction Laborers* compel a finding of federal jurisdiction in the case at bar. Contrary to the Ninth Circuit's view, federal law is fundamental, not "insignificant", to the resolution of this dispute.

FEDERAL LAW IS CONTROLLING IN THIS CASE — NOT "INSIGNIFICANT"

The underpinning for the Ninth Circuit's conclusion that Plaintiffs' claims do not "arise under" federal law within the meaning of either 28 U.S.C. § 1331 or § 1337 is its conclusion that federal law *"would play an insufficiently predominant role in the resolution of the state claim to give rise to federal jurisdiction over that claim..."* (*Hunter II*, Appendix A-26.) Naturally, if the Ninth Circuit is correct in its speculation that the California courts do not care about the validity of Plaintiffs' claim under federal law, one must conclude that federal law would be ignored and thus not play any role in deciding the state claim. However, that is the crux of the problem. Federal law is central to the issue. The states cannot relegate it to a secondary position. Neither can the Ninth Circuit.

Oddly enough the paramount importance of federal law to the determination of Plaintiffs' claims for either fraud, infliction of emotional distress, and most certainly bad faith, is illustrated best by California decisions that have considered the existence of a covenant of good faith in contracts subject to *state* regulation. As pointed out in *Masonite Corp. v. Pacific Gas & Electric Co.*, 65 Cal.App.3d 1, 135 Cal.Rptr. 170 (1976)

> "In analyzing the issue at hand in the context of the foregoing premises, we initially underline that while the reasonable rates, rules and regulations of the commission do become a part of every contract between a public utility and its patrons . . . the rights and duties of the contracting parties are determined by, and derived from, the underlying contract as a whole . . . As a consequence, in resolving the rights and liabilities of the parties here, we may not look solely to the rules

and regulations referred to by appellant, but rather must take into account and construe the *entire* contract."

Further, the California Supreme Court in *Seaman's Direct Buying Serv. v. Standard Oil*, __ Cal.3d. __, 206 Cal.Rptr. 354 (1984) recently considered at length what constituted an actionable claim for tortious bad faith. There, *Masonite* was cited with approval for the proposition that an implied covenant of good faith could exist in a regulated contract, however, the *Seaman's* Court refused to embrace a universal cause of action for *breach* of the implied covenant of good faith. Instead it pointed out:

> "For the purposes of this case it is unnecessary to decide the broad question which Seaman's poses. Indeed, it is not even necessary to predicate liability on a breach of the implied covenant. It is sufficient to recognize that a party to a contract may incur tort remedies when, *in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists.*
>
> "It has been held that a part to a contract may be subject to tort liability, including punitive damages, if he coerces the other party to pay more than is due under the contract terms through the threat of a lawsuit, made " 'without probable cause and with no belief in the existence of the cause of action.' " (*Adams v. Crater Well Drilling, Inc.* (1976) 276 Or. 789, 556 P.2d 679, 681.) There is little difference, in principle, between a contracting party obtaining excess payment in such manner, and a contracting party seeking to avoid all liability on a meritorious contract claim by adopting a "stonewall" position ("see you in court") without probable cause and with no belief in the exist-

> ence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics . . . Acceptance of tort remedies in such a situation is not likely to intrude upon the bargaining relationship or upset reasonable expectations of the contracting parties." (Emphasis added.)

However, as discussed below, "acceptance of tort remedies" in the case at bar will, of necessity, "intrude upon the" regulation of United claims practices by the ICC. That is why any actionable claim must arise under federal law. Also, since an actionable claim for "bad faith" under California law entails either an in depth analysis of the federal relationship between the Hunters and United that is supervised by the ICC (as in *Masonite*), or United must have denied its federal contractual obligations in bad faith (as in *Seaman's*). Does not either determination turn entirely on *federal law?* How then can the Ninth Circuit say that federal law would play an "insufficiently predominant role" in deciding the state claim? It is all too plain that in both *Thurston* and *Hunter II* the Ninth Circuit is grasping at any straw and manufacturing catch phrases to avoid deciding claims *arising under* the Interstate Commerce Act.

4

FEDERAL UNIFORMITY EMBODIED IN THE INTERSTATE COMMERCE ACT COMPELS A FINDING OF JURISDICTION OVER "BAD FAITH" CLAIMS.

The federal statutes, regulations and ICC-approved tariffs under which United must operate on a uniform and nondiscriminatory basis are set forth above and copied in Appendices "K" and "M". Is United to be subjected to the expense of defending claims for large awards of punitive damages in the courts of California by every dissatisfied claimant upset with the claims handling procedures United

must follow under 49 CFR 1005? Is United to be burdened with suits for punitive damages under state law by those who demand special treatment or special considerations not afforded by ICC rules and approved tariffs? Is United to pay more in settlement for claims of shippers in California because of the threat of punitive damages than shippers in Mississippi? The need for uniformity and nondiscrimination compels the recognition of federal jurisdiction in the case at bar.

Surely in a proper case substantive violations of federally controlled claims procedures would be redressable in federal court. (See *Hunter I* footnote 6, Appendix C11.) In turn, does not the District Court have jurisdiction to apply federal law and tell claimants that they are imagining wrongs and causes of action where none exist? If uniformity is to prevail, federal jurisdiction must exist. As pointed out in *Atchison and Topeka S. Ry. Co. v. Springer,* 172 F.2d 346, 350 (7th Cir., 1949):

> "In *Keogh v. C. and N. W. R. Co.,* 260 U.S. 156 ... in discussing the legal rights of the shipper against an interstate carrier, the Supreme Court of the United States said, "*the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier* (citing numerous authorities)." This stringent rule prevails because the otherwise paramount purpose of Congress — prevention of unjust discrimination — might be defeated." (Emphasis added.)

CONCLUSION.

For the reasons stated above, United respectfully submits that a Writ of Certiorari be issued to reverse *Hunter II* and to compel the Ninth Circuit to review the Summary Judgment on the merits.

Respectfully submitted,

GROVER A. PERRIGUE, III
JAMES CLARK LEECH
JANICE E. HARDIN

By: _____

GROVER A. PERRIGUE, III
Attorneys for Petitioner

APPENDIX A

JAMES K.T. HUNTER and GINA F. BRANDT,
Plaintiffs-Appellants,

v.

UNITED VAN LINES, A MISSOURI CORPORATION, TRILCO., INC., A CALIFORNIA CORPORATION, JOHN TRLICA, CROWN TRANSFER AND STORAGE, A CALIFORNIA CORPORATION, BELMONT VAN AND STORAGE COMPANY, A CALIFORNIA CORPORATION, AND JOHN FALBE, DEFENDANTS-APPELLEES.

No. 83-5911.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

ARGUED AND SUBMITTED JAN. 5, 1984.

DECIDED NOV. 5, 1984.

Shippers brought claim for less than $10,000 under the Carmack Amendment and state law claims for fraud, bad faith, and intentional infliction of emotional distress against carrier and its independent contractors. Following removal from state court, the United States District Court for the Central District of California, Richard A. Gadbois, Jr., J., denied motion to remand and granted partial summary judgment in favor of defendants on the ground that state law claims were preempted by the Carmack Amendment and then remanded remaining claims to state court. Shippers appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) presence of federal preemption defense could not support federal jurisdiction; (2) in order to invoke the doctrine of artful pleading, federal law which preempts the state law claims must also provide a federal remedy; (3) even though state law claims might "hinge on" the Carmack Amendment claim, they did not arise under an act of Congress regulating commerce; and (4) jurisdic-

tional amount requirement could not be satisfied by aggregating the amounts claimed under state law claims with the amounts claimed under the Carmack Amendment.

Reversed and remanded.

Sneed, Circuit Judge, filed an opinion concurring in the result.

1. Federal Courts 196

The "arising under" language in commerce jurisdiction statute is interpreted in essentially the same way as the "arising under" phrase in the general federal question jurisdiction statute. 28 U.S.C.A. §§ 1331, 1337.

2. Federal Courts 241

Case arises under federal law within the meaning of the general federal question statute only if the federal question appears on the face of the plaintiff's well-pleaded complaint; if not, original jurisdiction is lacking even if the defense is based on federal law. 28 U.S.C.A. § 1331.

3. Removal of Cases 11

Removal jurisdiction exists only if original jurisdiction would have existed. 28 U.S.C.A. § 1441(a).

4. Federal Courts 241
Removal of Cases 251(1)

The "well-pleaded complaint rule" applies to removal cases as well as to cases of original jurisdiction. 28 U.S.C.A. § 1441(a).

5. Removal of Cases 11

Defendant cannot remove a state law claim from state to federal court even if his defense is based entirely on federal law. 28 U.S.C.A. § 1441(a).

6. Constitutional Law 56

Congress has the power to confer removal jurisdiction over cases in which only the defense is based on federal law; original removal statute conferred jurisdiction over such cases on federal courts. 28 U.S.C.A. § 1441(a).

7. Removal of Cases 11, 25(1)

When plaintiff presents a state law claim and defendant counters by arguing that federal law preempts the state law on which the plaintiff relies, federal claim appears by way of defense and, under the well-pleaded complaint rule, federal jurisdiction over such a claim is lacking. 28 U.S.C.A. § 1337.

8. Removal of Cases 11

No matter how real and substantial the defendants' interest in having their federal preemption argument decided by a federal court might be, under the current removal statute, such an interest is not a cognizable basis for federal jurisdiction. 28 U.S.C.A. § 1441(a).

9. Removal of Cases 25(1)

The "artful pleading doctrine," under which the court does not accept the plaintiff's claim that he is only presenting state law claims but recharacterizes the claims as federal claims so that federal jurisdiction may be exercised over them, is an exception the ordinary rules of federal jurisdiction.

See publication Words and Phrases for other judicial constructions and definitions.

10. Removal of Cases 25(1)

Although a finding of federal preemption is necessary for application of the artful pleading doctrine, such a finding is not sufficient by itself to invoke the doctrine.

11. Removal of Cases 25(1)

Artful pleading doctrine applies in the preemption context only when plaintiff has a federal claim to assert an addition to its purported state law claim.

12. Removal of Cases 25(1)

Artful pleading doctrine applies only when federal law not only displaces the state law but also confers a federal remedy.

13. Removal of Cases 11

When federal law displaces state law without supplanting it, plaintiff cannot be deemed to be attempting to avoid a federal cause of action as there is no federal cause of action to avoid; in such a case, federal preemption operates only as a defense and cannot provide a basis for exercise of federal question jurisdiction so as to permit removal. 28 U.S.C.A. §§ 1331, 1441(a).

14. Removal of Cases 25(1)

In the absence of any allegation that federal law afforded shippers a remedy for their claimed injuries resulting from carrier's alleged fraud, bad faith, and intentional infliction of emotional distress, artful pleading doctrine could not be invoked to require recharacterization of those state law claims, allegedly preempted by federal law, as federal claims over which a federal court could exercise jurisdiction and case could not be removed from state court on that basis. 28 U.S.C.A. §§ 1331, 1441(a).

15. Federal Court 31

Parties may not confer subject matter jurisdiction on federal courts by agreement but parties' agreement as to the legal issues involved in a case may be considered.

16. Federal Courts 243

Allegation that state law claims for fraud, bad faith, and intentional infliction of emotional distress "hinged on"

whether they were preempted by Carmack Amendment did not show that suit arose under an act of Congress regulating commerce. 28 U.S.C.A. § 1337; Revised Interstate Commerce Act, 49 U.S.C.A. § 11707.

17. Federal Courts 197

Regardless of whether, in order to prevail on California tortious bad-faith claim, shippers would have to show that their Carmack Amendment claim was valid or simply colorable, the role played by federal law in that state law claim for tortious bad faith in rejecting a claim under the Carmack Amendment was insufficient to show that the state law claims arose under an act of Congress relating to commerce. 28 U.S.C.A. § 1337; Revised Interstate Commerce Act, 49 U.S.C.A. § 11707.

18. Federal Courts 161

Principal purpose of the grant of original federal question jurisdiction is to afford plaintiffs a sympathetic and knowledgeable forum for the vindication of their federal rights. 28 U.S.C.A. § 1331.

19. Federal Courts 332

Court does not have jurisdiction over state law claims merely because they include federal element which involves a Carmack Amendment claim of less than $10,000. 28 U.S.C.A. § 1337; Revised Interstate Commerce Act, 49 U.S.C.A. § 11707.

20. Federal Courts 347

Jurisdictional amount for Commerce Act jurisdiction may not be satisfied by aggregating the amount of a plaintiff's claims under state law with the amount claimed under the Carmack Amendment. 28 U.S.C.A. § 1337; Revised Interstate Commerce Act, 49 U.S.C.A. § 11707.

21. Federal Courts 347

In case between nondiverse parties, state law claim over which there is no independent basis for federal jurisdiction may never be aggregated with a federal claim or order to reach the jurisdictional amount.

22. Federal Courts 14

Federal court, under certain circumstances, may decide claims over which the court does not independently have jurisdiction only if those claims are related in given ways to a claim over which the court does independently possess jurisdiction; federal court acquires its power over the claim which is otherwise beyond its cognizance only if the court has previously been properly seized of jurisdiction; federal court's jurisdiction over the state law claim is entirely derivative of its jurisdiction over the federal claim.

23. Federal Courts 344

Aggregation of claims is not an exception to the doctrine of pendent jurisdiction; aggregation of claims is simply a device for allowing the assertion of federal jurisdiction over two or more claims, each of which properly falls within the jurisdiction of the federal courts except for the fact that its amount is insufficient; what is required in such cases is that the combined amount of the claim meet the federal jurisdictional standard.

24. Federal Courts 344, 347

Single plaintiff may aggregate as many claims as he has against a single diverse defendant in order to meet jurisdictional amount, even if no single claim reaches that amount; plaintiff may aggregate several federal question claims against a single defendant in order to reach the jurisdictional amount; right of aggregation exists even when one claim is based on diversity of citizenship and one or more on presence of a federal question. 28 U.S.C.A. § 1331.

25. Federal Courts 344

All claims that may be properly joined under the Federal Rules of Civil Procedure may be aggregated in order to reach the jurisdictional amount. Fed.Rules Civ.Proc. Rule 18, 28 U.S.C.A.

26. Federal Courts 347

Federal jurisdiction cannot be created by aggregating a state law claim with a federal claim that does not meet the jurisdictional amount requirement even if the state law claim arises out of the same nucleus of operative facts as the federal claim.

Appeal from the United States District Court for the Central District of California.

Before SNEED and REINHARDT, Circuit Judges, and EAST,* District Judge.

REINHARDT, Circuit Judge:

Plaintiffs filed suit in state court against a common carrier and its independent contractors. They presented a claim under the Carmack Amendment, 49 U.S.C. § 11707 (Supp. V 1981), seeking damages for injuries to their property caused by the common carrier. They also presented state-law claims for fraud in the negotiation of the contract of carriage and for bad faith and intentional infliction of emotional distress in connection with the defendants' handling of the damage claims. Defendant common carrier removed the case to federal district court, arguing that the Carmack Amendment preempted the state laws plaintiffs relied on.

Plaintiffs made a motion to remand the entire action to state court on the ground that federal jurisdiction over this

---

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

case was lacking. They argued that the federal claim[1] did not reach the jurisdictional amount and that federal jurisdiction over the state claims was lacking. The district court, without an opinion, denied the motion to remand. It later granted partial summary judgment in favor of the defendants on the ground that the state-law claims were preempted by the Carmack Amendment. It then remanded to state court the claims against the independent contractors and the remaining claim against the common carrier.

Plaintiffs appeal. They argue that the district court should have remanded the entire case to state court without considering the preemption issue because federal jurisdiction over the case was lacking. We agree.

DISCUSSION

Jurisdiction in this case was premised on the removal statute, 28 U.S.C. § 1441(a), which confers federal removal jurisdiction over any civil action over which the district courts would have had jurisdiction had the case been brought there originally. Appellees assert that the district court would have had jurisdiction over this case under 28 U.S.C. § 1337(a). That section provides as follows:

> (a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, That the district courts shall have original jurisdiction of an action brought under sec-

---

[1]As used in this opinion the term "federal claim" means a claim arising under federal law, whether or not it meets the jurisdictional amount. *Cf. Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372, n. 11, 98 S.Ct. 2396, 2401 n. 11, 57 L.Ed.2d 274 (1978) (using the term "federal claim" to mean a claim over which there is an independent basis of jurisdiction).

> tion 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

28 U.S.C. § 1337(a) (1982). It is clear that the district court would have had jurisdiction over this case under section 1337(a) had the Carmack Amendment claim exceeded $10,000. It is also clear that plaintiffs' Carmack Amendment claim was for significantly less than $10,000.[2] Each of plaintiffs' state-law claims, however,, well exceeds the jurisdictional amount. Thus, if plaintiffs' state-law claims could be deemed to "arise under" the Carmack Amendment, or if the amounts claimed under state law could be considered in determining the "matter in controversy" within the meaning of section 1337(a), there would be no jurisdictional-amount problem. Appellees set forth a number of theories under which they contend federal jurisdiction over this case can be found. We shall address each in turn.

[1] Preliminarily, however, we note that "the 'arising under' language in section 1337 is interpreted in essentially the same way as the 'arising under' phrase in section 1331." *Garrett v. Time-D.C., Inc.*, 502 F.2d 627, 629 (9th Cir.1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1569, 43 L.Ed.2d 778 (1975). In interpreting that language in section 1337, therefore, we shall draw freely from authorities discussing the circumstances under which a case "arises under" federal law within the meaning of section 1331. We also note that

---

[2]Appellants seek only $2,500 under section 11707. Appellants also raise a claim for attorney's fees under section 11711. 49 U.S.C. § 11711(d) (Supp. V 1978). They seek only $3,000 in attorney's fees. Even if the attorney's fees request could be aggregated to the Carmack Amendment claim to reach the jurisdictional amount, *but cf.* 28 U.S.C. § 1337 (requiring that the "matter in controversy *for each receipt or bill of lading*" exceed $10,000 (emphasis added)); *infra* at Section III.B., appellants' claim would fall short of the jurisdictional amount by $4,500.01.

the burden of establishing federal jurisdiction falls on the party who invokes the removal statute. *Salveson v. Western States Bankcard Association*, 731 F.2d 1423, 1426 (9th Cir. 1984). Here, appellees bear that burden. Moreover, the removal statute must be strictly construed against them. *Id.*

I. *Jurisdiction Based on Preemption*

[2-5] We begin our analysis with a well-settled, elementary principle of "arising under" jurisdiction: a case "arises under" federal law within the meaning of the general federal question statute only if the federal question appears on the face of plaintiff's well-pleaded complaint; if not, original jurisdiction is lacking even if the defense is based on federal law. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Because removal jurisdiction exists only if original jurisdiction would have existed, the so-called "well-pleaded complaint rule" applies to removal cases as well. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 2845-48, 77 L.Ed.2d 420 (1983). A defendant thus cannot remove a state-law claim from state to federal court even if his defense is based entirely on federal law.

[6] The rationale behind tying removal jurisdiction to original jurisdiction is questionable: if the principal purpose of giving federal courts original jurisdiction over federal claims is to afford parties relying on federal law a sympathetic, knowledgeable forum for the vindication of their federal rights, *see* Mishkin, *The Federal "Question" in the District Courts*, 53 Colum.L. Rev. 157, 170-76, then it makes little sense to allow a defendant to remove a case to federal court only if the *plaintiff* relies on federal law. Congress plainly has the power to confer removal jurisdiction over cases in which only the defense is based on federal law. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 2843, 77 L.Ed.2d 420

(1983) (This rule "involv[es] perhaps more history than logic."); *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 103 S.Ct. 1962, 1972, 76 L.Ed.2d 81 (1983). In fact, the original removal statute conferred jurisdiction over such cases on federal courts. Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470; *see Railroad Co. v. Mississippi,* 102 U.S. 135, 26 L.Ed. 96 (1880). Commentators have urged Congress once again to confer on federal courts removal jurisdiction over cases in which the defendant relies on federal law. *See, e.g.,* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1312 (1969). Congress, however, has failed to act and, since at least 1894, removal jurisdiction has been unavailable in cases in which the federal question appeared only as a defense. *See Tennessee v. Union & Planters' Bank,* 152 U.S. 454, 459, 14 S.Ct. 654, 655, 38 L.Ed. 511 (1894). Until Congress changes that rule, it will remain true that, despite the compelling policies favoring a contrary rule, defendants relying on federal law are not entitled to a federal forum unless the plaintiff also relies on federal law.

[7, 8] When, as in the case before us, plaintiff presents a state-law claim and defendant counters by arguing that federal law preempts the state law on which plaintiff relies, the federal claim appears by way of defense. *Cf. Champion International Corp. v. Brown,* 731 F.2d 1406, 1407 (9th Cir. 1984) (finding federal jurisdiction over a declaratory judgment action in which *plaintiffs* argument was based on federal preemption). Under the well-pleaded complaint rule, federal jurisdiction over such a claim is lacking. *See Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983); *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367 (9th Cir.1984); *Guinasso v. Pacific First Federal Savings and Loan Association,* 656 F.2d 1364 (9th Cir.1981), *cert. denied,* 455 U.S. 1020, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982). We

recognize defendants' very real and, in our view, substantial interest in having their federal preemption argument decided by a federal court. However, under the current removal statute, such an interest is simply not a cognizable basis for federal jurisdiction.

II. *Jurisdiction Based On Artful Pleading*

Appellees cite a number of cases in which, they assert, we departed from the foregoing principle: *Schroeder v. Trans World Airlines Inc.*, 702 F.2d 189 (9th Cir.1983); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir.1980); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978); *Johnson v. England*, 356 F.2d 44 (9th Cir. 1966), *cert. denied*, 384 U.S. 961, 86 S.Ct. 1587, 16 L.Ed.2d 673 (1966). All of those cases are labor cases in which the plaintiff professed not to be relying on federal law. In each case, the defendant removed the case to federal court and the district court denied the plaintiff's motion to remand. Citing cases holding that the particular conduct complained of was governed exclusively by federal law, the court in each case rejected the plaintiff's argument that his claim was purely a state-law claim. We affirmed the finding that federal jurisdiction existed under the so-called "artful pleading" doctrine, which operates to allow courts under some circumstances to recharacterize a plaintiff's state-law claim as a federal claim.[3] Appellees here argue that those

[3]We note that the artful pleading doctrine applies in other contexts as well. In fact, we have recently chided a party in a position similar to appellees' for seeking injunctive and declaratory relief against prosecution in state court of a state claim that it alleged was preempted. We said that the party "would not be permitted by artful pleading to anticipate a defense to a state law claim based on federal law and thus bring within federal jurisdiction a case that otherwise could not be heard there." *Alton Box Board Co. v. Esprit de Corp.*, 682 F.2d 1267 (9th Cir.1982).

cases stand for the proposition that federal jurisdiction over an asserted state-law claim exists whenever the state-law claim is preempted by federal law. We reject such a broad reading of the artful pleading doctrine.

First, we note that there exists some tension between the artful pleading doctrine and what has been called the corollary of the well-pleaded complaint rule — the "master of the complaint" rule. *See* 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3566, at 438 (1975) [hereinafter cited as *Federal Practice and Procedure*]. Justice Holmes wrote in 1913, "the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913). A different rule would seem most inappropriate in a judicial system such as ours: if a person is free not to vindicate his rights in court at all, then he should be free to assert in court only those rights he chooses. Because our system is adversarial in nature, a defendant is required to address only those claims plaintiff raises. Thus, ordinarily at least, if plaintiff chooses to raise only a state-law challenge to particular conduct, and if defendant prevails on his argument that the asserted state-law claim has been preempted by federal law, the case is over. Moreover, under such circumstances plaintiff may have lost not only the claim he actually presented; in many cases he will have also lost his right to challenge the same conduct on federal grounds. *See Migra v. Warren City School District Board of Education*, ____ U.S. ____, 104 S.Ct. 892, 78 L.Ed.2d 56 (1984) (federal court must give state court judgment the same preclusive effect as would be given that judgment under the law of the state that rendered the judgment).

[9] The artful pleading cases cited by appellees depart from that model. Instead of simply accepting the plaintiff's claim that he is only presenting state-law claims — which in each of those cases would have resulted in a remand by the federal court for lack of subject-matter jurisdiction and ultimately in dismissal on the merits by a state court based on federal preemption — the district court (a) recharacterized plaintiff's state-law claims as federal claims, (b) exercised jurisdiction over them, and (c) proceeded to consider whether the plaintiff should prevail under federal law. The artful pleading doctrine, as applied in those cases, is thus clearly an exception to the ordinary rules of federal jurisdiction. Our task is to determine whether this case falls within that exception. We conclude that it does not.

[10] If we were to accept appellees' argument that the artful pleading doctrine applies whenever federal law preempts plaintiff's state-law claims, we would be entirely eliminating the general rule that federal jurisdiction does not exist simply because the defendant claims preemption as a defense. Such a holding would thus be inconsistent with our cases holding that the general rule retains vitality. *See Guinasso v. Pacific First Federal Savings and Loan Association*, 656 F.2d 1364 (9th Cir.1981), *cert. denied*, 455 U.S. 1020, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982); *Nalore v. San Diego Federal Savings and Loan Association*, 663 F.2d 841, 842 (9th Cir.1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982); *see also Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 2846-48, 77 L.Ed.2d 420 (1983); 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.160[4] (1983) (discussing cases from other courts applying the rule appellees urge us to adopt and stating that

> the better view is expressed by the Third, Seventh, Eighth, and Ninth Circuits which have concluded that the assertion of a defense that federal law has pre-

> empted the state law upon which plaintiff relies does not create a federal question for purposes of the general removal statute. Preemption involves a federal issue; but there is no justification for distinguishing the issue of preemption from any other federal issue raised in defense.

(citations omitted)). Thus, while we think that a finding of federal preemption is necessary, in most cases, before jurisdiction can be found under the artful pleading doctrine, *see Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir.1984), we reject plaintiff's argument that such a finding is sufficient.

In a recent non-preemption decision, we made it clear that where a plaintiff could plead either a state or a federal claim, he "is free to ignore the federal question and pitch his claim on the state ground." *Salveson v. Western States Bankcard Association*, 731 F.2d 1423, 1427 (9th Cir.1984) (quoting 1 A. Moore's Federal Practice ¶ 0.160, at 1835 (2d ed. 1979)). We went on to say "[t]he artful pleading doctrine is to be invoked only in *exceptional circumstances* as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." (emphasis added). *Id.* We nevertheless applied the doctrine in that case. We did so for the identical reason we found the Supreme Court had applied it in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). We said that in both cases the plaintiffs had first filed suits alleging federal claims in federal courts and lost, and then attempted to recharacterize and refile those same claims in state court. *Salveson*, 731 F.2d at 1429. We said that the "[state] claim was really the same [federal] claim in disguise against which summary judgment had already been entered. . . ." *Id.* at 1427.

[11] Our opinions have not fully articulated the rationale behind the artful pleading doctrine. Nor have we said what circumstances are "exceptional." In addition to the comments we made in *Salveson,* we have suggested without much further explanation that the doctrine prevents plaintiffs from "attempt[ing] to avoid a federal cause of action." *Garibaldi,* 726 F.2d at 1370; *see also id.* at 1370-71 n. 5; *Schroeder,* 702 F.2d at 191. The Supreme Court has also been somewhat cryptic in its explanations It has suggested only that the general rule that the plaintiff is master of his complaint does not apply if he has "a fraudulent purpose to defeat removal." *Great Northern Railway Co. v. Alexander,* 246 U.S. 276, 282, 38 S.Ct. 237, 239, 62 L.Ed. 713 (1918). These statements leave unanswered many questions regarding the relationship between the master of the complaint rule and the artful pleading doctrine. However, along with the cases we discuss *infra,* they suffice to make it clear that the artful pleading doctrine applies in the preemption context only when a plaintiff has a federal claim to assert. If he does not he can hardly be deemed to be either harboring a fraudulent purpose or avoiding a federal cause of action by characterizing his claim as a state-law claim.

[12] In *Guinasso v. Pacific First Federal Savings and Loan Association,* 656 F.2d 1364 (9th Cir.1981), *cert. denied,* 455 U.S. 1020, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982), we discussed a number of the artful pleading cases. Although our opinion is not entirely clear on the point, properly read it stands for the proposition that the artful pleading doctrine applies only when federal law not only displaces state law but also confers a federal remedy. *See* 656 F.2d at 1367. In the artful pleading cases we discussed in *Guinasso,* the claims involved were claims under § 301 of the Labor Management Relations Act of 1947 [LMRA], 29 U.S.C. § 185 (1982), which until 1957 had been thought to be governed by state law. *See Johnson v. England,* 356 F.2d 44 (9th Cir.

1966), *cert. denied,* 384 U.S. 961, 86 S.Ct. 1587, 16 L.Ed.2d 673 (1966). In *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), however, the Supreme Court held for the first time that claims under section 301 would be governed by federal common law. After *Lincoln Mills,* the claims that had previously been thought to be state law claims continued to exist as before except that the governing law became federal rather than state. "In contrast," we said in *Guinasso,* "federal law provides neither the right asserted nor the remedy sought by the present plaintiffs." 656 F.2d at 1367 (footnote omitted).

In *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367 (9th Cir.1984), we removed any doubt that may have remained after *Guinasso* about the necessity of a federal remedy. As we explained, "[t]he distinction between an artfully pled complaint and one that is preempted, but not removable, lies in whether . . . the facts alleged were sufficient to state a federal cause of action on the face of the complaint." *Id.* at 1370 n. 5 (citation omitted). If so, we said, the claim is "removable because artfully pled." "Thus," we noted, "removal was proper [in *Fristoe v. Reynolds Metals Co.,* 615 F.2d 1209 (9th Cir.1980),] because an allegation of breach of a collective bargaining agreement *states on its face* an action under the [Labor Management Relations Act]." *Id.* at 1371 n. 5 (emphasis in original). We found removal improper in other cases, we said, because "the preemption argument focused on the proposition that the state could not regulate the field, not that the complaint stated a federal cause of action." *Id.* "The preemption was *defensive,*" we explained, "and not proper grounds for removal." *Id.* (emphasis in original).

[13] *Garibaldi* made it clear that a state-law claim may be recharacterized as a federal claim only when the state-law claim is preempted by federal law *and* when it is apparent from a review of the complaint that federal law provides

plaintiff a cause of action to remedy the wrong he asserts he suffered. We recently reaffirmed that rule in *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir.1984). There, after discussing the foregoing cases, we found the recharacterization proper because it was "apparent" that the complaint "actually stated claims under federal law." *Id.*, at 1476. Thus, at least in this Circuit, removal is improper when federal law simply displaces state law without replacing the state cause of action with a federal one. When federal law displaces state law without supplanting it, a plaintiff cannot be deemed to be attempting to avoid a federal cause of action; there is no federal cause of action to avoid. In such a case federal preemption operates only as a defense.[4]

The Supreme Court's recent holding in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), confirms the correctness of the rule we have derived from our earlier cases. In *Construction Laborers*, the Court was interpreting the holding of *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists*, 376 F.2d 337, 339-40 (6th Cir. 1967), *aff'd*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968). In *Avco*, removal was found proper even though the plaintiff sought to enforce a collective bargaining agreement only on the basis of state law. The *Construction Laborers* Court thought that "*Avco* stands for the proposi-

---

[4]Commentators have offered additional explanations, as well as criticisms, of our artful pleading cases. *See* 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.160[4] n. 2 (suggesting that the holding in *Johnson v. England, supra*, was based on the fact that "federal instrumentalities" had exclusive jurisdiction over the claim involved there); Note, *Intimations of Federal Removal Jurisdiction in Labor Cases: The Pleadings Nexus*, 1981 Duke L.J. 743, 753-79 (criticizing *Fristoe, supra*, and explaining that in *Johnson v. England, supra*, the court was simply interpreting an ambiguous complaint and trying to determine whether the plaintiff was in fact relying on federal law). We express no opinion concerning these explanations.

tion that if a *federal cause of action* completely preempts a state cause of action any complaint that comes within the scope of the *federal cause of action* necessarily 'arises under' federal law." 103 S.Ct. at 2854 (emphasis added). Under *Construction Laborers* recharacterization is proper only if a federal cause of action exists. The Court found federal jurisdiction lacking in that case because, among other things, federal law "does not provide an alternative cause of action in favor of the State to enforce its rights, while § 301 expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its preempted state contract claim." 103 S.Ct. at 2855.

[14, 15] Applying that test here, we conclude that the artful pleading doctrine does not provide a basis for federal jurisdiction over the state claims alleged by the appellants in this case. Appellees, who seek to invoke federal jurisdiction, have failed to argue, let alone demonstrate, that federal law affords plaintiffs a remedy for the injuries they claim they suffered. Rather, their argument is that federal law displaces the state laws plaintiffs rely on. They state, in fact, that "[i]f Congress wanted to provide the Hunters with the additional causes and remedies they seek, Congress would have done so."[5] Because the preemption argument

---

[5]We recognize that parties may not confer subject-matter jurisdiction on federal courts by agreement. That is not to say, however, that the parties' agreement as to the legal issues involved in a case may never be considered. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 103 S.Ct. at 2848 (When the law that creates the cause of action is state law, "original federal jurisdiction is unavailable unless it appears that some substantial, *disputed* question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is 'really' one of federal law." (emphasis added)). We think that the parties' agreement as to the legal issues the case raises is relevant to determining whether removal was proper in this case. Moreover, as we noted at the outset, appellees have the burden of establishing the existence of removal jurisdiction, *supra* slip op. p. 4914, at p. ——.

is thus defensive, a necessary requirement for recharacterizing the complaint is not satisfied, and we need not consider whether there is any merit to appellee's argument that the state-law claims are preempted. Federal jurisdiction is lacking whether or not the state claims are preempted.[6]

III. *Jurisdiction Based on General "Arising Under" Principles*

We next consider whether plaintiffs' state-law claims, as pleaded, can be said to "arise under" federal law within the meaning of 28 U.S.C. § 1331 or § 1337. Plainly, the state-law claims do not survive the most well-accepted of the tests for determining whether a case "arises under" federal law, the test Justice Holmes enunciated in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916): "A suit arises

---

[6]We do not suggest that the requirements we have discussed are the only ones applicable. If, as the Supreme Court has suggested, the doctrine applies only when plaintiff has a "fraudulent purpose," *see supra* slip op. at p. 4918, at pp. __/__, then it may, for example, apply only when the preemption issue and the question of whether a federal cause of action exists are both so clear cut as to call into question the plaintiff's good faith in asserting the state claim. Certainly, if there is some question as to whether a state claim has been preempted or whether a federal claim exists, a fraudulent purpose cannot be inferred from the fact that only a state claim was presented. When plaintiff can have a good faith belief that a state claim has not been preempted or that no federal claim exists, he cannot be said, by alleging a state claim, to have manifested a fraudulent purpose to defeat removal.

We do not decide whether the artful pleading doctrine applies only when it is *clear* that federal law preempts the asserted state claim and that a federal claim is available. Our earlier discussion regarding the question of the lack of a federal remedy makes any further reference to that point unnecessary here. We note, however, that it is far from clear that the state-law claims plaintiffs assert here have been preempted.

under the law that creates the cause of action." The rights plaintiffs seek to vindicate in their claims for fraud, intentional infliction of emotional distress, and tortious bad faith were conferred by California, not by the United States. Appellees assert, however, that jurisdiction exists under a more expansive interpretation of "arising under" jurisdiction. We disagree.

A. *Limitations Derived from General "Arising Under" Principles*

[16] Appellees rely on our discussion of "arising under" principles in *Guinasso v. Pacific First Federal Savings and Loan Association*, 656 F.2d 1364 (9th Cir.1981), *cert. denied*, 455 U.S. 1020, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982). There, we said that "a suit arises under an act of Congress regulating commerce within 28 U.S.C. § 1337 if it . . . 'hinges on' the act's interpretation." *Id.* at 1366. Appellees suggest that the state claims involved here "hinge on" whether the Carmack Amendment preempts them. Appellees ignore the sentence immediately following the one they rely on: "A substantial proposition of federal law must form 'a direct and essential element of the *plaintiff's* cause of action.'" *Id.* (emphasis added) (quoting *Smith v. Grimm*, 534 F.2d 1346, 1350 (9th Cir.), *cert. denied*, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976)). We have already explained that a preemption claim, when set up as a defense to a state claim, does not give rise to federal jurisdiction under sections 1331 or 1337. In fact, *Guinasso* itself stands flatly for that proposition. We see no need to repeat that discussion here.

Appellees have a somewhat more plausible argument when they contend that federal jurisdiction over plaintiffs' state-law claims exists because plaintiffs can prevail on those claims only if they establish that their Carmack Amendment claim is meritorious. They argue that a substantial proposition of federal law therefore forms "a direct

and essential element" of each of plaintiffs' state causes of action, *see Smith v. Grimm*, 534 F.2d at 1350 (9th Cir. 1976), and each therefore "arises under" federal law within the meaning of section 1337. We disagree.

The state claim that we think fits appellees' description most closely is the claim for tortious bad faith. The gist of that claim is that defendants engaged in harassment and intimidation designed to cause plaintiffs to abandon their Carmack Amendment claims or to accept unsuitable amounts in settlement. Some of the acts plaintiffs allege would, we think, constitute torts even in the absence of a Carmack Amendment dispute — indeed, the same alleged scheme forms the factual basis for plaintiffs' other state-law claims. The core of the tortious bad faith claim, however, is that the alleged harassment and intimidation on the part of appellees constituted a breach of their state-law duty to handle the contract claim in good faith. We assume that, in order to prevail on such a state-law claim, plaintiffs must show that they had at least a colorable contract claim against defendants; otherwise, there would have been no duty to negotiate the claim in good faith, and no breach would have occurred. Here, the alleged contract claim that gave rise to the duty to negotiate in good faith was a claim which was itself governed by federal law. Federal law thus can be said to form an ingredient in plaintiffs' state-law claim for tortious bad faith. We must determine whether that federal ingredient is sufficient to give rise to federal jurisdiction under sections 1331 or 1337.

We begin by noting that Congress undoubtedly has the power to confer on the district courts federal jurisdiction over claims such as this one. As Chief Justice Marshall held in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 824, 6 L.Ed. 204 (1824), the constitutional "arising under" provision extends to all causes in which "the [federal] question forms an original ingredient." How-

ever despite language almost identical to the constitutional provision, the general federal question statute has been interpreted far more narrowly. As Justice Cardozo observed in 1936, and we repeated in 1976,

> [i]f we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Gully v. First National Bank, 299 U.S. 109, 118, 57 S.Ct. 96, 100, 81 L.Ed. 70 (1936), *quoted in Smith v. Grimm,* 534 F.2d at 1350.

Justice Cardozo's compass was a metaphor for the judicially formulated limitations that have been read into the "arising under" language in the general federal question statute. Those limitations have been expressed in a series of tests for determining when a case "arises under" federal law, some of which are more useful than others. *See Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission,* 588 F.2d 1216, 1225 (9th Cir.1978), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979), ("[The] cases do not fit snugly into a single, logical mosaic"). Appellees argue that the "hinges on" language they rely on is one such test. We find the phrase of limited usefulness, however. First, although we used it in two cases, in neither one did we either apply it or expound upon it. *See Guinasso,* 656 F.2d at 1366; *Garrett v. Time-D.C., Inc.,* 502 F.2d 627, 629 (9th Cir.1974), *cert. denied,* 421 U.S. 913, 95 S.Ct. 1569, 43 L.Ed.2d 778 (1975). In *Garrett,* we cited

Gully when using the "hinges on" language, but one of the things Justice Cardozo made clear in *Gully* is that countless claims can be said to depend in some way on federal propositions, yet not all such cases "arise under" federal law. The most obvious purport of the "hinges on" language — that a claim "hinges on" federal law when plaintiffs' success depends in any way on the application of a proposition of federal law — thus cannot be the intended one. Because on careful examination the phrase seems, by itself, to tell us little, we must look to other authorities for guidance.

[17] Justice Cardozo instructed us to determine whether the federal element in the claim was "basic" as opposed to "collateral," and "necessary" as opposed to "merely possible." *Gully,* 299 U.S. at 118, 57 S.Ct. at 100. Similarly, courts have looked to whether the federal element in the claim was "pivotal," *North American Phillips Corp. v. Emery Air Freight Corp.,* 579 F.2d 229, 233 (2d Cir.1978), or "substantial," *Franchise Tax Board v. Construction Laborers Vacation Trust,* 103 S.Ct. at 2848, as opposed to merely "incidental[]," *Postal Instant Press v. Clark,* 741 F.2d 256 at 257 (9th Cir.1984), or whether it was "direct and essential" as opposed to "attenuated," *Smith v. Grimm,* 534 F.2d at 1350-51, or "paramount" as opposed to "collateral," *Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Authority,* 582 F.2d 444, 450 (8th Cir.1978) (quoting *Baker v. Riss & Co.,* 444 F.2d 257, 259 (8th Cir. 1971)), *cert. denied,* 439 U.S. 1040, 99 S.Ct. 872, 59 L.Ed.2d 56 (1979). Thus, the resolution of the federal question must play a significant role in the proceedings. We conclude that the role played by federal law in plaintiffs' state-law claim for tortious bad faith (as well as in plaintiffs' other state-law claims) is insufficient to gives rise to federal "arising under" jurisdiction.

There is some question as to whether in order to prevail on their California tortious bad faith claim plaintiffs would

have to show that their Carmack Amendment claim is *valid*, or simply *colorable*. We have found no controlling authority.[7] We think that it would be more sensible to require only a showing that the underlying claim has some substance, for even a person whose claim ultimately fails can be said to be entitled to good faith treatment during the settlement process. However, because of the uncertainty in the applicable law, we address both possibilities.

If California's duty of good faith is triggered by a colorable claim, as opposed to one ultimately found valid, then the federal element is insufficiently substantial under any standard. Even as to the preliminary, threshold question of whether defendant had a duty towards plaintiff, federal law would not be controlling in this state-law cause of action, for the degree of substance in the federal claim necessary to trigger the state-law duty to bargain in good faith would be a question of state law. If California requires only a colorable contract claim, the federal element in this case would beyond any question be "collateral" and "attenuated." Like the federal element we found insufficient to give rise to federal jurisdiction in *United Air Lines v. Division of Industrial Safety,* 633 F.2d 814 (9th Cir.1980), *cert. denied,* 454 U.S. 944, 102 S.Ct. 485, 70 L.Ed.2d 255 (1981), the federal issue here would be "tangential to the task of construing the state [law] and may not even be conclusive." *Id.* at 816. We would have, at most, only a "possible" federal question.

---

[7]We assume for purposes of this opinion that the torts alleged by the plaintiffs exist under California law. Defendants contend in their brief that California does not in fact confer the right or the remedy plaintiffs assert. If so, then defendants should prevail on the merits. However, if plaintiffs' state claims do not exist, federal jurisdiction cannot be based on the proposition that federal law is an essential element of state claims.

Even if California requires a showing that the contract claim is valid, federal jurisdiction is lacking. To be sure, proving a federal element would be necessary to making out the state claim. Nonetheless, federal law would play an insufficiently prominent role in the resolution of the state claim to give rise to federal jurisdiction over that claim. The gist of plaintiffs' bad faith claim is that defendants engaged in conduct regarding the handling of the underlying claim that is made unlawful by California; the federal element merely determines as a preliminary matter, whether the duty imposed by the state is applicable in the case of a particular transaction. The fact that federal law plays a preliminary, threshold role in the case of state claims such as this one does not, by itself, transform such state claims into federal ones.

The cases involving federal land patents and federal trademarks and copyrights are instructive. The former cases reveal that "a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress." *Shulthis v. McDougal*, 225 U.S. 561, 570, 32 S.Ct. 704, 706, 56 L.Ed. 1205 (1912). As the Supreme Court recently explained, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for 'arising under' jurisdiction merely to allege that ownership or possession is claimed under a United States patent." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676-77, 94 S.Ct. 772, 781-82, 39 L.Ed.2d 73 (1974) (citation omitted). Thus, although ownership of property is certainly a prerequisite to the accrual of property rights, and although the ownership of the property was a proposition of federal law, federal question jurisdiction was denied.

The trademark and copyright cases referred to above proceed on a similar theory. *See Postal Instant Press v.*

Clark, 741 F.2d 256 (9th Cir.1984); *T.B. Harms Co. v. Eliscu,* 339 F.2d 823 (2nd Cir.1964), *cert. denied,* 381 U.S. 915, 85 S.Ct. 1534, 14 L.Ed.2d 435 (1965). There, federal "arising under" jurisdiction was denied in cases seeking to enforce state-created property or contract rights despite the fact that those rights were triggered by — or in the case of contract rights, made possible by — the existence of a federal trademark or a copyright. In addition to the reasons set forth in the land patent cases, in *Postal Instant Press* we considered the fact that the involvement of federal case law was "incidental[]." *Postal Instant Press v. Clark,* 741 F.2d 256 at 257.

The case before us does not "arise under" federal law for reasons similar to those set forth in the cases we have just discussed. Just as the property and contract claims involved in the land patent, trademark and copyright cases apply to property or contracts generally and without regard to their genesis, the state bad faith law relied on here applies to persons with legal claims of any type. The federal element is involved only "incidentally." *Id.* Like the claim in *Postal Instant Press,* we think that the tortious bad faith count "fundamentally asserts [state] claims," *id.,* and that federal jurisdiction is therefore lacking.

[18] We arrive at the same conclusion if we look directly to the policies underlying the grant of original federal question jurisdiction, as we have done in other cases. *See Keaukaha-Panaewa Community Association,* 588 F.2d at 1226-27; *League to Save Lake Tahoe v. B.J.K. Corp.,* 547 F.2d 1072, 1074 (9th Cir.1976) (both citing *Gully v. First National Bank,* 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed.70 (1936)). The "compass" Justice Cardozo referred to in *Gully,* 299 U.S. at 118, 57 S.Ct. at 100, was designed to point courts to the types of cases most deserving of federal attention. To identify those cases, we should have in mind the principal purpose of the grant of original federal question jurisdic-

tion — to afford plaintiffs a sympathetic and knowledgeable forum for the vindication of their federal rights. *See supra* slip op. at p. 4915, at p. ___. There would appear to be little need for such a forum when the right involved in a case was conferred by the state. State courts are presumably just as sympathetic to and knowledgeable about rights conferred by the state. When there is a federal element to a state claim, the presence of that element may, theoretically at least, raise the possibility of state court hostility to the entire claim. However, when the federal element is of the type involved here — that is, when the state law requires plaintiff to establish the validity or colorability of a related federal right for which there is already a federal remedy — the doctrine of pendent jurisdiction would in most cases operate to allow the state claim to be brought into federal court as pendent to the federal one. By and large, the only instances in which the state claim could not be brought into federal court as a result of the doctrine of pendent jurisdiction would be those involving federal claims, such as this one, that Congress has relegated to the state courts. With regard to these claims, however, the theoretical problem noted above is not a real problem because by relegating the underlying federal claim to state court Congress has recognized that the state forum is an appropriate one for resolution of the federal claim. *A fortiori*, the state forum should be adequate for the related state claim.[8]

---

[8]The Supreme Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), mentioned an additional requirement: when the cause of action was created by state law, the federal element must be a *disputed* question of federal law. *Id.* 103 S.Ct. at 2848. Because we have disposed of this case on other grounds, we need not decide whether this additional requirement was satisfied. We do not, however, that there does not appear to have been a dispute concerning the existence of a claim under the Carmack Amendment. Only the extent of the damages recoverable appears to have been at issue.

B. *Limitations Imposed by 28 U.S.C. § 1337(a)'s Jurisdictional Amount Proviso*

Finally, we are persuaded that federal jurisdiction over the state claims involved here is foreclosed by the jurisdictional amount provision of section 1337. As we noted above, when the federal element of a state claim is a related federal claim over which federal jurisdiction is lacking, affording federal jurisdiction over the state claim would not further the purposes underlying the rules governing original federal jurisdiction. Deeming such a state claim to "arise under" federal law would in effect make a difference *only* with regard to those cases involving federal claims that Congress has decided should be litigated in the state rather than the federal court. Such a rule would be anomalous indeed.

[19] The anomaly would be particularly disturbing when the federal element consists of a Carmack Amendment claim. Section 1337 of title 28 contains a proviso dealing specifically with Carmack Amendment claims. It provides that "the district courts shall have original jurisdiction of an action brought under [the Carmack Amendment], only if the matter in controversy *for each receipt or bill of lading* exceeds $10,000, exclusive of interest and costs." 28 U.S.C. § 1337(a) (Supp. V 1981) (emphasis added). Section 1337(a)'s jurisdictional amount requirement relating to Carmack Amendment claims is *more stringent* than other jurisdictional amount requirements; whereas, ordinary, separate federal claims against the same defendant may be aggregated to meet the jurisdictional amount requirement in section 1337(a) precludes aggregation of separate Carmack Amendment claims. *See also* discussion *infra* at Section IV. Section 1337(a)'s jurisdictional amount provision was plainly intended to relegate to state courts Carmack Amendment claims for less than $10,000. *See* S.Rep. No. 117, 95th Cong., 2d Sess. 49-50, *reprinted in* 1978 U.S. Code

Cong. & Ad. News 3569, 3611-13. It would be inconsistent with that purpose to construe section 1337 as conferring jurisdiction over state-law claims merely because they include a federal element involving a Carmack Amendment claim of less than $10,000. Because the federal element here is a Carmack Amendment claim for only $2,500, the state claims do not "arise under" section 1337.

Thus, even if we assumed that a state claim that includes a federal claim as tangential as the one here involved would ordinarily be deemed to "arise under" federal law, we would conclude that since the federal claim is a Carmack Amendment claim for less than the jurisdictional amount, federal jurisdiction is absent.

IV. *Pendent Jurisdiction and Aggregation of Claims.*

[20] In this section we consider whether section 1337(a)'s jurisdictional amount requirement may be satisfied by aggregating the amount of plaintiffs' claims under state law with the amount claimed under the Carmack Amendment. We conclude that it may not.

[21] The amount-in-controversy requirement was added to section 1337 in 1978. In adding that requirement, Congress stated all but explicitly that the requirement was to be interpreted consistently with the similar requirements that existed then in the diversity and general federal question statutes. *See* 28 U.S.C. § 1332 (1982); 28 U.S.C. § 1331 (1976) (amended in 1980 to remove the amount-in-controversy requirement, Pub.L. No. 96-486, 94 Stat. 2369); S.Rep. No. 117, 95th Cong., 2d Sess. 49-51, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3569, 3612-13 (stating that the absence of a jurisdictional amount requirement in section 1337 "is a basic inconsistency with diversity and Federal question jurisdiction" and that the addition of the requirement to section 1337 was "intended to . . . add consistency to Federal jurisdictional requirements"); *see also Bucci v. Allied*

Van Lines, Inc., 548 F.Supp. 189, 192 (W.D.Pa.1982). In interpreting section 1337, therefore, we refer to rules developed in diversity and general federal question cases. Those cases make it entirely clear that in a case between nondiverse parties a state-law claim over which there is no independent basis for federal jurisdiction may never be aggregated with a federal claim in order to reach the jurisdictional amount.

[22] In a case between nondiverse parties, the doctrine of pendent jurisdiction provides the only basis for federal jurisdiction over a state-law claim. It has long been established, however, that that doctrine operates to allow a federal court, under certain circumstances, to decide claims over which the court does not independently have jurisdiction *only* if those claims are related, in given ways, to a claim over which the court *does* independently possess jurisdiction. *See Siler v. Louisville & Nashville Railroad,* 213 U.S. 175, 191, 29 S.Ct. 451, 454, 53 L.Ed. 753 (1909); *Hurn v. Oursler,* 289 U.S. 238, 243-46, 53 S.Ct 586, 588-89, 77 L.Ed. 1148 (1933); *United Mine Workers v. Gibbs,* 383 U.S. 715, 722-25, 86 S.Ct. 1130, 1136-38, 16 L.Ed.2d 218 (1966); *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 370-73, 98 S.Ct. 2396, 2400-02,, 57 L.Ed.2d 274 (1978); J. Moore & J. Lucas, 1 *Moore's Federal Practice* ¶ 0.90[3] (2d ed. 1981); 3A *id.* at ¶ 18.07[3] (2d ed. 1977); 6 *Federal Practice and Procedure* § 1588; 14 *id.* at § 3704. The federal court acquires its power over the claim otherwise beyond its cognizance only if the court has previously properly been seized of jurisdiction. The federal court's jurisdiction over the state-law claim is entirely derivative of its jurisdiction over the federal claim. *See* 6 *id.* § 1588, at 816; Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 Colum.L.Rev. 1018, 1019 (1962).

If we found jurisdiction in this case by aggregating plaintiffs' state law claims with their federal claim, we would be

turning the traditional notion of pendent jurisdiction on its head. Because pendent jurisdiction is derivative, it makes no sense to speak of pendent jurisdiction until after a court has independently acquired jurisdiction over a federal cause of action. The doctrine of pendent jurisdiction has never been thought to play any role whatsoever in a federal court's initial acquisition of jurisdiction over a case. If we allowed aggregation of the state and federal claims here, however, we would be holding that a claim may be "pendent" to a claim over which federal jurisdiction is lacking because of a failure to meet the jurisdictional amount requirement; if the "pendent" state-law claim and the federal claim, considered together, met the jurisdictional amount, the federal courts would, under such a holding, have jurisdiction even though federal jurisdiction over both claims considered separately would be lacking. Under such a rule, the state claim would provide an integral and necessary ingredient of the court's jurisdiction over the federal claim. We find no support in the cases for such a radical departure from well-established notions of pendent jurisdiction.

[23, 24] Aggregation of claims has never been thought of as an exception to the doctrine of pendent jurisdiction. Rather, as an examination of the cases makes clear, aggregation of claims is simply a device for allowing the assertion of federal jurisdiction over two or more claims, each of which properly falls within the jurisdiction of the federal courts except for the fact that its amount is insufficient. What is required in such cases is that the combined amount of the claims meets the federal jurisdictional standard. In other words, parties are permitted to aggregate all claims over which the court would independently have jurisdiction *but for* the jurisdictional amount requirement. Thus, a single plaintiff may aggregate as many claims as he has against a single diverse defendant in order to meet the jurisdictional amount, even if no single claim reaches that

amount. *See, e.g., Bullard v. City of Cisco,* 290 U.S. 179, 187-90, 54 S.Ct. 177, 180-81, 78 L.Ed. 254 (1933); *Combined Communications Corp. v. Seaboard Surety Co.,* 641 F.2d 743 (9th Cir.1981); *Stone v. Stone,* 405 F.2d 94, 96 (4th Cir. 1968), *cert. denied,* 409 U.S. 1000, 93 S.Ct. 315, 34 L.Ed.2d 261 (1972); *Alberty v. Western Surety Co.,* 249 F.2d 537 (10th Cir.1957); *Pearson v. National Society of Public Accountants,* 200 F.2d 897 (5th Cir.1953); *Simecek v. United States National Bank of Omaha,* 91 F.2d 214 (8th Cir.1937); J. Moore & J. Lucas, 1 *Moore's Federal Practice* ¶ 0.97[1] (2d ed. 1975); 14 *Federal Practice and Procedure* § 3704. Similarly, a plaintiff may aggregate several federal question claims against a single defendant in order to reach the jurisdictional amount. *See* 6 *id.* at § 1588. And the right of aggregation exists even when one claim is based on diversity of citizenship and one or more on the presence of a federal question. *See* 14 *id.* § 3704, at 412-13; *Hales v. Winn-Dixie Stores, Inc.,* 500 F.2d 836, (4th Cir.1974).

[25] We have found no case, however, in which federal jurisdiction was created by aggregating a state-law claim with a federal claim falling short of the jurisdictional amount. Instead, formulations of the aggregation rule by leading commentators — at least those that are not ambiguous, *cf. infra* note 9 — *preclude* aggregation in cases such as this one. Professors Wright and Miller, for instance, state that "[t]he general rule is that in an action involving a single plaintiff and a single defendant, when the basis of jurisdiction is diversity of citizenship *or when each of the claims sought to be joined involves a federal question,* a party may aggregate all the claims he has against an opposing party in order to satisfy the requisite jurisdictional amount." 6 *Federal Practice & Procedure* § 1588, at 805 (citations omitted; emphasis added); *see also* 14 *id.* § 3704, at 412-13 ("When plaintiff joins several claims against the defendant, the general rule . . . is that the value

of all the claims can be added together in determining whether the requisite jurisdictional amount exists. This right of aggregation exists even though one of the claims may be based on diversity of citizenship jurisdiction and one or more may be based on federal question jurisdiction." (citations omitted)); Comment, Federal Jurisdiction — A Plaintiff Can Aggregate His Federal and Nonfederal Claims Against the Same Defendant in Order to Meet the Jurisdictional Amount Requirement for Federal Diversity Jurisdiction, 53 Tex.L.Rev. 604, 605 (1975) ("[The] aggregation doctrine provides that when diversity of citizenship exists or all claims are federal, a single plaintiff may combine his claims against a single defendant to meet the matter-in-controversy requirement." (citations omitted)).[9] In

---

[9]The aggregation rule is also often framed by reference to the rules concerning joinder: all claims that may properly be joined under rule 18, of the Federal Rules of Civil Procedure may be aggregated in order to reach the jurisdictional amount. *See* 14 *Federal Practice and Procedure* § 3704; 1 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 0.97[1] (2d ed. 1975); 36A C.J.S. *Federal Courts* § 310(6)(a) (1960). Rule 18, read in conjunction with rule 82, permits a plaintiff to join against a defendant all claims over which the court has jurisdiction. Fed.R.Civ.P. 18(a); Fed.R.Civ.P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."). *United States v. United Pacific Insurance Co.*, 472 F.2d 792, 794 n. 5 (9th Cir.), *cert. denied*, 411 U.S. 982, 93 S.Ct. 2273, 36 L.Ed.2d 958 (1973); *see generally* 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 18.07[1.-1] (2d ed. 1975); 6 *Federal Practice and Procedure* § 1588, at 807. As noted earlier, a federal court has jurisdiction over a state-law claim between non-diverse parties only if it has pendent jurisdiction over the claim. And, in a non-diversity case, a federal court can have pendent jurisdiction over a claim only if it has independently obtained jurisdiction over a federal claim.

The Advisory Committee Notes to the 1966 amendment to rule 18(a) state that rule 18(a) "deals only with pleading" and "does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading."

fact, Professors Wright and Miller have described the relationship between the rule concerning aggregation of claims and the doctrine of pendent jurisdiction in plain terms: "[U]nlike the aggregation of totally unrelated claims, none of which meet the requisite amount, a claim joined under the pendent jurisdiction doctrine is brought into the action only when the court's power over the main claim gives it jurisdiction over the entire controversy and the pendent claim bears a strong factual relationship to the main claim." 6 *Federal Practice and Procedure* § 1588, at 816.

Fed.R.Civ.P. 18 advisory committee note to 1966 amendment. That language seems to indicate that jurisdictional requirements should not be considered in determining whether claims have been properly joined under rule 18; jurisdictional limitations apply, but not by virtue of rule 18. Such a reading of the rule might support the argument that, under the aggregation rule as stated *supra* this note, claims may be aggregated to meet the amount-in-controversy requirement regardless of whether the court has jurisdiction over them. Such an argument, however, is plainly untenable. Even the dissent in this case does not contend that, in a nondiversity case, *any* state-law claim, no matter how unrelated, may be aggregated to a federal claim in order to satisfy the jurisdictional amount requirement. Plainly, the commentators cited *supra* were taking jurisdictional limitations into account when they referred to rule 18. *See also* Fed.R.Civ.P. 18(a) advisory committee note 3 ("The provisions of this rule for the joinder of claims are subject to Rule 82 (Jurisdiction and Venue Unaffected),").

Of course, if the commentators intended that all jurisdictional requirements to be taken into account, the rule they stated would be meaningless: only those claims that independently met the jurisdictional amount requirement could then be aggregated. What they may have meant is that claims that could be joined under rule 18(a) *without regard to the jurisdictional amount requirement* may be aggregated in order to satisfy that requirement. Insofar as such a formulation would allow aggregation of a state-law claim with a federal claim that arises from the same nucleus of operative facts, however, it conflicts with the well-settled principle of pendent jurisdiction described above. We do not believe that those commentators

The rationale for allowing aggregation only of claims that independently satisfy all jurisdictional requirements but the amount-in-controversy requirement is evident. Congress has determined that certain types of claims merit federal attention: federal claims and claims between citizens of different states are two such types. Congress has also determined, however, that some such claims merit federal attention only when they are of a given magnitude. When a plaintiff has two claims each of which is of a type that merits federal attention, but neither of which by itself meets the jurisdictional amount requirement, he is allowed to combine the claims to establish that his case is of the magnitude that merits federal attention. The idea is that two such separate claims are the equivalent of one claim meriting federal attention of the combined magnitude. Although one may quarrel with the wisdom of allowing a plaintiff to come into federal court by combining his claims in that way, *see* 14 *id.* at § 3704, one cannot say that the rule is devoid of logic.

The same cannot be said, however, of a rule allowing parties to come into federal court with a claim that is of the type that merits federal attention, but is of insufficient magnitude, and a claim that is not of the type that merits

---

had such a case in mind when they stated their rule of aggregation. First, none of the commentators cites a single case allowing aggregation under such circumstances. More important, none of the commentators recognizes a conflict between the rule of aggregation, as he enunciates it, and the principle of pendent jurisdiction described above. Indeed, some state all but explicitly that there is no conflict. *See, e.g.*, 6 *Federal Practice and Procedure* § 1588, at 816. We are therefore confident that they would not quarrel with the following formulation: all claims by a single plaintiff against a single defendant that could be joined under rule 18(a) if they *independently* met all jurisdictional requirements other than the amount-in-controversy requirement may be aggregated in order to reach the jurisdictional amount. That is the rule stated in the text.

federal attention. However, one looks at two such disparate claims, one is left with a case that does not merit federal attention.

[26] In sum, we think it clear that federal jurisdiction cannot be created by aggregating a state-law claim with a federal claim that does not meet the jurisdictional amount requirement — even if the state-law claim arises out of the same nucleus of operative facts as the federal claim. If the district court relied on the aggregation doctrine, it either misinterpreted the law or read a different rule into the jurisdictional amount proviso of section 1337. As we have already stated, however, the legislative history of section 1337 makes it plain that Congress intended that the proviso be interpreted consistently with other jurisdictional amount requirements. Moreover, the only difference between section 1337 and other statutes containing amount-in-controversy requirements makes the requirement *more* stringent in section 1337 cases. Section 1337 requires that "the matter in controversy *for each receipt or bill of lading*" exceed $10,000. 28 U.S.C. § 1337(a) (Supp. V 1981) (emphasis added). That language was obviously intended to *narrow* federal jurisdiction in Carmack Amendment cases by prohibiting aggregation of Carmack Amendment claims arising from separate bills of lading. *See Pillsbury Co. v. Atchison, Topeka and Santa Fe Railway*, 548 F.Supp. 28 (D.Kansas 1982); *cf.* 14 *Federal Practice and Procedure* § 3704 (ordinarily, separate federal claims may be aggregated to meet jurisdictional amount). Clearly, language intended to prevent aggregation of separate Carmack Amendment claims if they relate to different bills of lading cannot support a reading of 1337 as permitting aggregation of Carmack Amendment claims with state-law claims. In fact, the additional language in section 1337 would appear *a fortiori* to preclude any such reading.

CONCLUSION

Federal jurisdiction over this case was lacking. The presence of a federal preemption defense cannot support federal jurisdiction. Nor under the circumstances was the district court at liberty to recharacterize the state law claims as federal claims. In addition, the state law claims did not "arise under" federal law under any of the asserted interpretations of sections 1331 or 1337. Finally, section 1337's jurisdictional amount requirement cannot be satisfied by aggregating the amounts plaintiffs claim under state law with the amounts claimed under the Carmack Amendment. Because federal jurisdiction over this case was lacking whether or not plaintiffs' state-law claims were preempted, the district court should have granted plaintiffs' motion to remand the entire action to state court without deciding the preemption issue.

REVERSED AND REMANDED TO DISTRICT COURT WITH INSTRUCTIONS TO REMAND TO STATE COURT.

SNEED, Circuit Judge, concurring in the result:

I concur in the result reached by the opinion of the majority and acknowledge the error of my original opinion in this case.

Thus, I agree that the "well pleaded complaint" rule precludes removal of claims based on state law that the defendants assert has been preempted by federal law. I also agree that the plaintiffs have alleged state law claims that may or may not have been preempted by federal law, and that the plaintiffs' federal claim as pleaded is under the $10,000 jurisdictional amount fixed by 28 U.S.C. § 1337(a).

As Judge Reinhardt's opinion makes clear, the distinction between the non-removable "well pleaded complaint"

cases and the removable "artful pleading" cases is a difficult one. I am now convinced, however, that under our decisions the plaintiffs are entitled to the benefit of the former doctrine and spared the burden of the latter. The state claims of tortious bad faith in handling the plaintiffs' damage claim and of intentional infliction of emotional distress are sufficiently distinct from a claim of property damage based on the bill of lading to justify refusing to apply the doctrine of the artful pleading cases.

Whether such claims had been preempted, contrary to my initial impression, should be decided by the state court on remand, not by the federal court. I also agree with Judge Reinhardt when he concludes this is an improper case to permit aggregation of the claims to meet the jurisdictional amount required by 28 U.S.C. § 1337(a).

I do not join Judge Reinhardt's opinion because of relatively minor substantive differences with certain portions of the opinion, and because of its implications with respect to the merits of the defendants' preemption argument.

APPENDIX B

ORDER

NO. 83-5911

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES K.T. HUNTER and GINA F. BRANDT
Plaintiffs-Appellants,

vs

UNITED VAN LINES, a Missouri Corporation,
TRILCO, INC., a California Corporation,
JOHN TRLICA, CROWN TRANSFER AND
STORAGE, a California corporation
BELMONT VAN AND STORAGE COMPANY,
a California corporation, and JOHN FALBE,
Defendants-Appellees.

FILED

JAN. 29, 1985

PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

Before: SNEED and REINHARDT, Circuit Judges, and EAST,* District Judge

The panel as constituted has voted to amend its opinion in this case by striking the words "Even the dissent in this case does not contend that" in footnote 9, 23rd line of the second column of the slip opinion at 4928, and substituting therefor "No one would suggest".

With the opinion so amended, the panel has voted unanimously to deny the petition for rehearing. Judge Sneed and Judge Reinhardt have voted to reject the suggestion for rehearing en banc, and Judge East so recommends.

---

*Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

OPINION

NO. 83-5911

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES K.T. HUNTER and GINA F. BRANDT,
Plaintiffs-Appellants,

vs.

UNITED VAN LINES, a Missouri corporation,
TRILCO, INC., a California corporation,
JOHN TRLICA, CROWN TRANSFER AND
STORAGE, a California corporation,
BELMONT VAN AND STORAGE COMPANY,
a California corporation, and JOHN FALBE,
Defendants-Appellees.

FILED

JUN 25, 1984

PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, District Judge, Presiding
Argued and Submitted January 5, 1984

Before: *SNEED and REINHARDT, Circuit Judges, and EAST*, District Judge*

SNEED: Circuit Judge:

Plaintiffs filed suit in state court against a common carrier and its independent contractors seeking recovery for damages arising from the interstate transportation of household goods. The defendant common carrier removed the case to federal district court. The district court granted

---

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

partial summary judgment in favor of the common carrier on the grounds that the Carmack Amendment, 49 U.S.C. § 11707, preempts state law causes of action assetred by the plaintiffs. Thereafter the district court remanded to state court the claims against the independent contractors and the remaining federal claims against the common carrier. We affirm.

I

FACTS AND PROCEEDINGS BELOW

Nancy Hunter Jukes and John Jukes (the Jukeses) contracted with United Van Lines, Inc. (United) to transport household goods from Pennsylvania to California. John K.T. Hunter and Gina F. Brandt (the Hunters) sent household items that they owned as part of the shipment arranged by the Jukeses. When United delivered the property, the Hunters and the Jukeses discovered that certain items were damaged. The Jukeses and the Hunters filed a damage claim with United, which responded by denying liability for some items and offering partial compensation for others. The Jukeses assigned their claims to the Hunters, who subsequently filed this action in the Superior Court of California for the County of Los Angeles.

The Hunters' complaint asserts six causes of action. The first seeks recovery of $2,500 under 49 U.S.C. § 11707 for damage to the property in transit. The second, third, and fifth causes of action assert state law claims based on the post-delivery handling of the Hunters' damage claim. The second cause of action against United and its independent contractors alleges tortious bad faith in the handling and the processing of the damage claim. In addition to the actual damages asserted in the first cause of action, the second cause seeks actual damages of $53,000 and punitive damages of $5,000,000 against United and $250,000 against United's independent contractors. The third cause requests the same damages as does the second, but alleges inten-

tional interference with contractual relations as the grounds for recovery. The fifth cause of action maintains that the handling of the damage claim constituted intentional infliction of emotional distress. The Hunters seek actual damages of $50,000 and punitive damages of $5,750,000 under this cause of action. The Hunters allege in the fourth cause of action that United's agent fraudulently misrepresented that payment of $250 would give the shippers $50,000 of insurance. This cause, which is only against United, incorporates the actual damages asserted in causes one and two and also seeks $5,000,000 in punitive damages. The sixth and final cause of action seeks recovery pursuant to 49 U.S.C. § 11711(d) of approximately $3,000 for attorney's fees.

United removed the case to the federal district court, which subsequently denied the Hunters' motion to remand. The district court granted partial summary judgment in favor of United on the second through fifth causes of action on the grounds that the Carmack Amendment preempts the state law claims. Thereafter, the district court remanded to state court the first and sixth causes of action against United and the second, third, and fifth causes of action against United's independent contractors.

II

DISCUSSION

The Hunters argue that removal was improper and, if the case was properly removed, that the state law claims against United are not preempted. The removal issue involves questions of law subject to de novo review. Because the grant of partial summary judgment on preemption grounds also involves questions of law, that issue is also reviewed de novo. United raises no issues on appeal.[1]

---

[1]References herein to "United" include the co-defendants who are United's employees or agents. Defendants Trilco, Inc. and John Trlica are referred to as United's independent contractors.

A. Removal Under 28 U.S.C. § 1445(b)

This case requires us to consider whether removal is appropriate when a plaintiff files suit in state court seeking recovery under 49 U.S.C. § 11707 for damages to goods in transit and under state law for damages resulting from alleged misconduct in the handling of a damage claim. We hold that 28 U.S.C. § 1445(b) authorizes removal in this case because the matter in controversy exceeds $10,000.

The general removal statute provides, with certain exceptions, that "any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). There is, however, a statutory bar to removal of cases arising under the Carmack Amendment. Under 28 U.S.C. § 1445(b), "[a] civil action in any State court against a common carrier or its receivors or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs."[2] United maintains that the requirements of section

---

[2]Congress in 1978 amended 28 U.S.C. § 1337(a) and § 1445(b) to "require a $10,000 jurisdictional amount in cases commenced in Federal Court, or removed from State court, for freight damage or delay claims by virtue of Section 20(11) of the Interstate Commerce Act [recodified as 49 U.S.C. § 11707]." S. Rep. No. 117, 95th Cong., 2d Sess. 49, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3569, 3612. The purpose of this amendment was to prevent the federal district courts from being inundated with small freight damage claims. *Id.* at 49-50, 1978 U.S. Code Cong. & Ad. News at 3612-13. As amended, 28 U.S.C. § 1337(a) provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against

1445(b) are satisfied because the Hunters' causes of action constitute, in effect, a single claim against the common carrier from a single bill of lading for more than $5,000,000. We agree.

Although the Hunters seek only $2500 in damages under section 11707, each of their state law claims depends directly on the bill of lading.[2] Under these cricumstances, it is

---

restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

Section 1445(b), unlike § 1337(a), does not explicitly require that the matter in controversy for *each* receipt or bill of lading exceed $10,000. Nonetheless, the legislative history indicates that Congress intended that the jurisdictional requirements for suits under the Carmack Amendment would be the same for § 1445(b) and § 1337(a). *See* S. Rep. No. 117, *supra*, at 49-50, 1978 U.S. Code Cong. & Ad. News at 3612-13. Consequently, we conclude that § 1445(b) also requires that the amount in controversy exceed $10,000 for each receipt or bill of lading.

[2]The Hunters argue that including the state law claims in determining if the $10,000 threshold is satisfied will frustrate the intent of Congress to keep small damage claims out of federal court. We appreciate the concern for the limits of federal jurisdiction, but we do not believe that our holding conflicts with the legislative intent expressed in § 1445(b). First, we allow consideration only of those state law claims directly related to the receipt or bill of lading. Appending an unrelated state law claim to a Carmack Amendment claim will not enable plaintiffs to evade the amount in controversy requirements. Not to allow consideration of directly related claims, on the other hand, would limit removal beyond what Congress intended. Second, our holding, *see infra*, concerning the Carmack Amendment's preemption of state law remedies indicates that plaintiffs henceforth will not be able to obtain federal jurisdiction under § 1445(b) on the basis of state law claims similar to those asserted here. An amount in controversy requirement may not be satisfied on the basis of claims for which it appears to a legal certainty that the plaintiff cannot recover. *See, e.g., Kahal v. J. W. Wilson & Assocs.*, 673 F.2d 547 (D.C. Cir. 1982); *Wiggins v. North American Equitable Life Assurance Co.*, 644 F.2d 1014 (4th Cir. 1981); C. Wright, *The Law of Federal Courts* § 33, at 184 (4th ed. 1983).

appropriate to consider the amounts sought against the common carrier under the state law causes of action in determining if the $10,000 threshold is satisfied. *Compare Bucci v. Allied Van Lines, Inc.*, 548 F. Supp. 189 (W.D. Pa. 1982) (separate claims under § 11707 that arise from one bill of lading may be aggregated to meet minimum jurisdictional amount, *with Pillsbury Co. v. Atchison, Topeka & Santa Fe Ry.*, 548 F. Supp. 28 (D. Kansas 1982) (separate claims under § 11707 that arise from different bills of lading may not be aggregated). We find that the $10,000 amount in controversy requirement is satisfied in this case.

B. Preemption of State Law Causes of Action

The Carmack Amendment governs the liability of common carriers subject to the jurisdiction of the Interstate Commerce Commission. Such common carriers are required to issue a receipt or bill of lading for property received for shipment. 49 U.S.C. § 11707(a)(1). A carrier's liability, however, is not affected by its failure to issue a receipt or bill of lading. *Id.* The carrier is liable for the actual loss or injury to the property caused by the receiving carrier, the delivering carrier, and any other carriers over whose line or route the property is transported. *Id.* The common carrier may not limit its liability except as provided in the Carmack Amendment. *Id.* § 11707(c)(1).

The scope of the Carmack Amendment's preemption of state law is addressed in *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913). Congress intended that the Amendment would eliminate the chaotic and inconsistent application of state law and federal common law to interstate cargo claims. *See id.* at 505-06. The Carmack Amendment creates a uniform standard of liability for the carrier, because "the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions." *Id.* at 505 (quoting *Southern Pac. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S.E. 865, 870 (1909));

see also 226 U.S. at 505 ("[I]t is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.").

Adams Express specifically considered whether a limitation on liability contained in a bill of lading was valid notwithstanding that state law prohibited such limitations. The Court ruled that the validity of the limitation was governed solely by the Interstate Commerce Act. Although the Court in *Adams Express* did not squarely address the continued existence of state common law remedies, the decision strongly indicates that Congress intended to occupy the field concerning claims for damages to goods shipped interstate.

> That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it.

Id. at 505-06.

We agree with those courts that have held that the Carmack Amendment prempts state common law remedies for damages arising from the interstate transportation of goods. *See, e.g., Fulton v. Chicago, Rock Island & Pacific R.R.*, 481 F.2d 326, 331-32 (8th Cir.), *cert. denied*, 414 U.S. 1040 (1973); *American Synthetic Rubber Corp. v. Louisville & Nashville R.R.*, 422 F.2d 462, 464-68 (6th Cir. 1970); *Wirth, Ltd. v. Silvretta*, 575 F.Supp. 1274, 1276-77 (N.D. Ill. 1984); *George R. Hall, Inc. v. Superior Trucking Co.*,

514 F. Supp. 581, 583-84 (N.D. Ga. 1981). Other courts have read *Adams Express* more narrowly and concluded that state law actions are not preempted if they are consistent with the Carmack Amendment. *See, e.g., Reed v. Aaacon Auto Transportation, Inc.*, 637 F.2d 1302, 1307 (10th Cir. 1981); *Hirsch v. National Van Lines, Inc.*, 666 P.2d 49, 56 (Ariz. Sup. Ct. 1983). We believe that such decisions miscontrue the import of *Adams Express.*[4]

The Hunters note that 49 U.S.C. § 10103 provides that, "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law." This provision does not alter our conclusion concerning the Carmack Amendment's preemption of common law actions. *See Wirth*, 575 F. Supp. at 1277 n.1. Section 10103 is the recodification of language formerly contained in 49 U.S.C. § 20 (11), which the Court in *Adams Express* found not to affect

---

[4]*Reed* notes that 49 U.S.C. § 20(11) provided that "nothing in this section 'shall deprive any holder of such receipt or a bill of lading of any remedy or right of action which he has under the existing law." 637 F.2d at 1307. The court then observes that *Adams Express* held that this proviso continues in existence those common law rights and remedies not inconsistent with the rules and regulations of the Act. *Id.* A careful reading of *Adams Express*, however, shows that the Court held that the proviso only continues existing federal law and does not preserve rights and remedies under state law. *See* 226 U.S. at 507-08.

Other courts have quoted the statement in *Adams Express* that the proviso "was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by state statute, or common law, not inconsistent with the rules and rules and regulations prescribed by the provisions of this act. . . ." *Id.* at 507. *See Season-All Indus. v. Merchant Shippers*, 451 F. Supp. 727, 732 (W.D. Pa. 1978). The Court's subsequent statements in *Adams Express*, however, indicate that the Carmack Amendment preempts all state law rights or remedies.

its holding. *See* 226 U.S. at 507-08; supra note 4. The recodification that created section 10103 was not intended to make a substantive change in the Interstate Commerce Act. *See* Pub. L. No. 95-473, 92 Stat. 1337 (1978); H.R. Rep. No. 1395, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3009, 3013.

The Hunters' reliance on *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984), is also unavailing. *Silkwood* held that the award of punitive damages under state law for conduct related to radiation hazards is not preempted, notwithstanding that federal law preempts state regulation of the safety aspects of nuclear energy. The Court noted that the relevant legislative history indicates that Congress anticipated state tort remedies would be available for conduct related to radiation hazards. *Id.* at 622-26. As an intermediate appellate court, we are reluctant to read *Silkwood* as overturning *sub silentio* prior decisions of the Supreme Court. It is better for us to hold that *Adams Express* correctly ascertained the intent of Congress in enacting the Carmack Amendment. The Court there held that Congress has occupied the field with respect to the liability of common carriers under a receipt or bill of lading. We are neither disposed nor authorized to reconsider that holding or to anticipate that the Supreme Court would today decide the case differently. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 103 S. Ct. 1343, 1344 (1983) (per curiam).

Finally, the Hunter's attempt to avoid the preemptive force of *Adams Express* by arguing that because their state law claims do not relate to the actual damage to the property, the Carmack Amendment does not apply. We disagree. First, the state law claims arise from and depend directly on United's alleged breach of its obligations under the bill of lading. The Hunters implicitly acknowledge this inasmuch as each of their state law causes of action incorporates the first cause of action under the Carmack Amendment.

Second, it has long been established that the Carmack Amendment embraces more than merely recovery for damages to the shipment itself. Instead, the statute is "comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the agreed transportation to the agreed destination." *New York, Philadelphia, & Norfolk R.R. v. Peninsula Produce Exchange*, 240 U.S. 34 (1916) (damages for failure to deliver with reasonable dispatch); *see also Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936) (damages for interruption of business caused by late delivery); *cf. Contempo Metal Furniture Co. v. East Texas Motor Freight Lines*, 661 F.2d 761, 765 (9th Cir. 1981) (standard for recovery of special damages under Carmack Amendment).

The Hunters essentially argue that United breached its obligations under the bill of lading and then refused to settle the Carmack Amendment claim to their satisfaction.[5] Allowing them to pursue tort sounding state law causes of

---

[5]The Hunters' fourth cause of action based on the alleged misrepresentation concerning insurance by United's agent is also preempted. Whether or not a shipper might have a federal cause of action based on a carrier's alleged fraudulent misquotation of a tarrif, *but see Consolidated Freightways Corp. v. Terry Tuck Inc.*, 612 F.2d 465, 466 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980) (no cause of action under Motor Carriers Act), we believe that the concerns for uniformity stated in *Adams Express* require that state law causes of action be preempted.

The Hunters' reliance on the "fair opportunity" rule is misplaced. Under that rule, a carrier may not limit liability to an amount less than actual damages unless the carrier gives the shipper a "fair opportunity" to choose between a higher or lower liability by paying a correspondingly higher or lower charge. *E.g., Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 809 (9th Cir. 1982). United does not here rely on a damage limitation in the bill of lading to refuse to pay the actual value of damages. The "fair opportunity" rule is inapplicable to this case.

action based on United's handling of the damage claim would frustrate the Carmack Amendment's purpose of bringing contracts for interstate shipments under a uniform rule of law.[6] The Hunters' suggestion that this purpose is served if the Carmack Amendment governs only the carrier's liability for damage to the shipment, leaving to state law the determination of liability for settling a damage claim based on the bill of lading, would return us to the pre-Carmack Amendment days of carrier liability. *Cf. Sylgab Steel & Wire Corp. v. Strickland Transportation Co.*, 270 F. Supp. 264, 268-70 (E.D.N.Y. 1967) (Carmack Amendment preempts common law action based on carrier's post-delivery agreement to repair damaged goods). We decline the invitation to relive history.

It follows that we affirm the district court's holding that the second through fifth causes of action against United are preempted.

C. The Remand of the Remaining Causes of Action

The district court concluded that the remaining causes of action were not within its original jurisdiction, and therefore exercised its discretion to remand these matters to state court. We find that the district court did not err as a matter of law or abuse its discretion in remanding the case.

---

[6]We note that our decision does not preclude the award of punitive damages under federal common law for a bad faith refusal to pay a damage claim. *See Miller v. Aaacon Auto Transport, Inc.*, 447 F. Supp. 1201, 1205 (S.D. Fla. 1978). We do not reach this issue in holding that the Carmack Amendment preempts the state law causes of action. Similarly, reference to state common law for purposes of interpreting the Carmack Amendment, *see, e.g., Gordon H. Mooney, Ltd. v. Farrell Lines, Inc.*, 616 F.2d 619, 625 (2d Cir.), *cert. denied*, 449 U.S. 875 (1980), is not inconsistent with our preemption holding.

The district court, however, was not required to remand. We have previously observed that a federal court has power to hear claims that would not have been independently removable even after the basis for removal jurisdiction has vanished from the proceedings. *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 681 (9th Cir. 1980); *Watkins v. Grover*, 508 F.2d 920, 921 (9th Cir. 1974). The district court, however, has discretion to remand the case to the state court from which it was removed. *Watkins*, 508 F.2d at 921; *Strusiner v. Perlin*, 478 F. Supp. 464, 468 (N.D. Ill. 1979); *Pisciotta v. Ferrando*, 428 F. Supp. 685, 688 (S.D.N.Y. 1977).

Here removal rested on the state law claims that, together with the Carmack Amendment claim, satisfied the amount in controversy requirement of section 1445(b). After the award of summary judgment against the Hunters, the state law claims against United vanished from the case, and the remaining claims would not have been independently removable.[7] The district court did not abuse its discretion by remanding this case.

AFFIRMED

---

[7]We need not determine if a request for attorney's fees pursuant to 49 U.S.C. § 11711(d) should be included in determining if the amount in controversy requirement of § 1445(b) is satisfied. Even if the fee request is included, the first and six causes of action against United do not meet the required jurisdictional amount.

APPENDIX D

REINHARDT, Circuit Judge, dissenting:

NO. 83-5911

HUNTER V. UNITED VAN LINES

FILED

JUNE 25, 1984

PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

I dissent.

The district court performed a remarkable sleight of hand. First it erroneously aggregated the amounts set forth in state-law claims with the amounts set forth in federal claims[1] in order to arrive at the amount necessary to support federal jurisdiction and thus defendant's removal of the case. After using the state-law claims in order to deny appellants' motion to remand the case to the state courts, it then decided as a matter of law, again erroneously, that the state-law claims did not exist. According to the district court, they were preempted. It therefore granted appellees' motion for summary judgment as to those claims. Then, having thus disposed of the state-law claims on the merits, the court was left with federal claims that were insufficient in amounts to meet the jurisdictional minimum, so it remanded those claims to the state court.

Even if we assume that a district court can acquire jurisdiction by aggregating state-law claims with federal claims that fall short of the jurisdictional amount, and even if we also assume that the state-law claims involved here were

---

[1]As used in this opinion, the term "federal claim" means a claim arising under federal law, whether or not it meets the jurisdictional amount. *Cf. Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372 n.11 (1978) (using the term "federal claim" to mean a claim over which there is an independent basis of jurisdiction).

preempted by federal law, it is unclear to me why the district court simply did not decide initially that the state-law claims were preempted and grant appellants' motion to remand the entire case to the state court; certainly, if the claims did not exist there was nothing to aggregate to obtain jurisdiction. The general rule is that a jurisdictional amount requirement is not satisfied if "it is apparent, to a legal certainty, that the plaintiff cannot recover the required amount . . ." *St. Paul Mercury Indemnity Co. v. Red Cab Co.* 303 U.S. 283, 289 (1938); *see* majority opinion at note 3. The district court's decision that the state-law claims did not exist because on their face they were preempted seems to constitute a determination that, to a legal certainty, plaintiff could not recover the required amount.[2]

The problems with the district court's decision, however, run far deeper. First, except in cases in which diversity of citizenship exists, federal jurisdiction can *never* be created by aggregating a state-law claim with a federal claim that does not reach the jurisdictional amount. Because federal jurisdiction was therefore lacking whether or not the state-law claims were preempted, the district court should have remanded the entire case to the district court without commenting on the preemption issue. Second, the district court erred in its decision on the merits of the preemption issue. The district court's conclusion that appellants' state-law claims were preempted by federal law was erroneous as a matter of law.

---

[2]I note that, after Judge Real denied the motion to remand the entire action, this case was transferred ot Judge Gadbois. It was Judge Gadbois who found the state claims preempted. The fact that two different judges were involved might explain the apparently inconsistent decisions. However, once the second judge concluded that on the face of the complaint the state-law claims were preempted, he should have recognized that there was no federal jurisdiction over the complaint and reconsidered the motion to remand rather than proceeding to grant summary judgment.

I

JURISDICTION

Without citing any authority, the majority holds that, in a nondiversity case, the jurisdictional amount requirement may be met by aggregating state-law claims with a federal claim that does not meet the jurisdictional amount requirement. The majority's holding departs from well-settled law and conflicts with both the letter and the spirit of the federal jurisdictional grant.[3]

Federal jurisdiction in this case was premised on the removal statute, 28 U.S.C. § 1441(a), which confers federal removal jurisdiction over any civil action over which the district courts have original jurisdiction. Appellees assert that the district courts have original jurisdiction over this case under 28 U.S.C. § 1337.[4] Appellants assert that original

---

[3]It is clear that the presence of the federal preemption issue does not provide a basis for federal jurisdiction over this case. It has long been settled that the presence of a federal defense does not render a case one "arising under" federal law within the meaning of the general federal question statute, 28 U.S.C. § 1331 (1982). *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908); *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966). Although that rule is not of constitutional dimensions, *see Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962, 1972 (1983), neither the district court nor the majority has argued that a different rule applies in section 1337 cases.

Nor does the district court or the majority proceed on the theory that the state-law claims should be treated as federal claims. I shall therefore not address the propriety of obtaining jurisdiction by simply treating what plaintiff calls a state-law claim as a federal claim.

[4]The majority discusses only 28 U.S.C. § 1445(b). That section, however, does no more than place a jurisdictional amount limitation on removal jurisdiction conferred by section 1441(a). Section 1441(a) confers removal jurisdiction only when the district court would have original jurisdiction. And section 1337 limits the district

jurisdiction under section 1337 is lacking because this case fails to meet that section's amount-in-controversy requirement. Appellants are plainly right.

Section 1337 provides that "the district courts shall have original jurisdiction of an action brought under 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs." 28 U.S.C. § 1337 (1982). Appellants' section 11707 claim falls far short of the jurisdictional amount.[5] In addition to the 11707 claim, appellants bring state-law claims that each well exceeds the jurisdictional amount. The majority holds that those state-law claims may be considered in calculating the amount in controversy because they are directly related to the bill of lading. That holding conflicts with settled principles concerning pendent jurisdiction and aggregation of claims.

The amount-in-controversy requirement was added to section 1337 in 1978. In adding that requirement, Congress stated all but explicitly that the requirement was to be

---

court's original jurisdiction in Carmack Amendment cases to cases meeting the jurisdictional amount. Because removal jurisdiction would therefore be unavailable if section 1337's jurisdictional amount requirement were not met, I consider only the jurisdictional amount requirement provided for in that section. Given my conclusions regarding section 1337, it is unnecessary for me to determine whether section 1445(b)'s jurisdictional amount requirement was complied with.

[5]Appellants seek only $2,500 under section 11707. Appellants also raise a claim for attorney's fees under section 11711. 49 U.S.C. § 11711(b) (1976). They seek only $3,000 in attorney's fees. Assuming the attorney's fees request may be aggregated to the Carmack Amendment claim to reach the jurisdictional amount, but *cf.* 28 U.S.C. § 1337 (requiring that the "matter in controversy *for each receipt or bill of lading*" exceed $10,000 (emphasis added)); *see generally infra* text accompanying note 4, appellants' claim falls short of the jurisdictional amount by $4,500.01.

interpreted consistently with the similar requirements that existed then in the diversity and general federal question statutes. 28 U.S.C. § 1332 (1982); 28 U.S.C. § 1331 (1976) (amended in 1980 to remove the amount-in-controversy requirement, Pub. L. No. 96-486, 94 Stat. 2369); *See* 1978 U.S. Code Cong. & Ad. News 3569, 3612-13 (stating that the absence of a jurisdictional amount requirement in section 1337 "is a basic inconsistency with diversity and Federal question jurisdiction" and that the addition of the requirement to section 1337 was "intended to . . . add consistency to Federal jurisdictional requirements"). *See also Bucci v. Allied Van Lines, Inc.*, 548 F. Supp. 189, 192 (W.D. Penn. 1982). In interpreting section 1337, therefore, we should refer to rules developed in diversity and general federal question cases. Those cases make it entirely clear that in a case between nondiverse parties a state-law claim may never be aggregated with a federal claim in order to reach the jurisdiction amount.

A. Pendent Jurisdiction

In a case between nondiverse parties, the doctrine of pendent jurisdiction provides the only basis for federal jurisdiction over a state-law claim. It has long been established, however, that that doctrine operates to allow a federal court, under certain circumstances, to decide claims over which the court does not independently have jurisdiction *only* if those claims are related, in given ways, to a claim over which the court *does* possess jurisdiction. *See Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191 (1909); *Hurn v. Oursler*, 289 U.S. 238, 243-46 (1933); *United Mine Workers v. Gibbs*, 383 U.S. 715, 722-25 (1966); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370-73 (1978); J. Moore, 1 *Moore's Federal Practice* ¶ 0.90[3] (1984) [hereinafter cited as *Moore*]; 3A *Moore* ¶ 18.07[3]; C. Wright, A. Miller & E. Cooper, 6 *Federal*

Practice and Procedure § 1588 (1975) [hereinafter cited as *Wright & Miller*]; 14 *Wright & Miller* § 3704. The federal court acquires its power over the claim otherwise beyond its cognizance only if the court has previously propertly been seized of jurisdiction. The federal court's jurisdiction over the state-law claim is entirely derivative of its jurisdiction over the federal claim. *See* 6 *Wright & Miller* at 816; Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 Colum, L. Rev. 1018, 1019 (1962).

The majority's holding turns the traditional notion of pendent jurisdiction on its head. Until now, it has never made sense to speak of pendent jurisdiction until after a court has independently acquired jurisdiction over a federal cause of action. It had never previously been thought that pendent jurisdiction played any role whatsoever in a federal court's initial acquisition of jurisdiction over a case. The majority, however, holds that a claim may be "pendent" to a claim over which federal jurisdiction is lacking because of a failure to meet the jurisdictional amount requirement. If the "pendent" state-law claim and the federal claim, considered together, meet the jurisdictional amount, the majority holds, the federal courts have jurisdiction even though federal jurisdiction over both claims when they are considered separately is lacking. Thus, jurisdiction over a pendent state claim is no longer derivative; rather, the state claim may now provide an integral and necessary ingredient of the court's jurisdiction over the federal claim.

The majority opinion fails to explain, let alone justify, its radical departure from well-established notions of pendent jurisdiction. It merely states its conclusion that the state-law claims may be aggregated to the federal claims because they are related to those claims. The close relationship between the federal and state claims, however, cannot

form the basis for an exception to the foregoing well-established principles of pendent jurisdiction. *All* pendent claims, by definition, are closely related to the main claim. *See generally United Mine Workers v. Gibbs,* 383 U.S. 715 (1966) (pendent state-law claims must arise from the same nucleus of operative facts as the federal claim). The majority's approach would effectively eliminate the rule that a pendent state claim may be brought in federal court only when the court has independent jurisdiction over a federal claim.

B. Aggregation of Claims

Rules concerning aggregation of claims also fail to support the majority's holding. Aggregation of claims has never been thought of as an exception to the doctrine of pendent jurisdiction. Rather, as an examination of the cases makes clear, aggregation of claims is simply a device for curing a failure to meet the jurisdictional amount requirement with respect to claims that each otherwise properly falls within the jurisdiction of the federal courts. To reach the jurisdictional amount, parties are permitted to aggregate all claims over which the court would independently have jurisdiction *but for* the jurisdictional amount requirement. Thus, a single plaintiff may aggregate as many claims as he has against a single diverse defendant in order to meet the jurisdictional amount, even if no single claim reaches that amount. *See, e.g., Bullard v. City of Cisco,* 290 U.S. 179 187-90 (1933); *Combined Communications Corp. v. Seaboard Surety Co.,* 641 F.2d 743 (9th Cir. 1981); *Stone v. Stone,* 405 F.2d 94 (4th Cir. 1968), *cert. denied,* 409 U.S. 1000 (1972); *Alberty v. Western Surety Co.,* 249 F.2d 537 (10th Cir. 1957); *Pearson v. National Society of Public Accountants,* 200 F.2d 897 (5th Cir. 1953); *Simecek v. United States National Bank of Omaha,* 91 F.2d 214 (8th Cir. 1937); *Moore* ¶ 0.97[1]; 14 *Wright & Miller* § 3704.

Similarly, a plaintiff may aggregate several federal claims against a single defendant in order to reach the jurisdictional amount. *See Wright & Miller* at § 1588. And the right of aggregation exists even when one claim is based on diversity of citizenship and one or more on the presence of a federal question. *See* 14 *Wright & Miller* at § 3704; *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836, 846 (4th Cir. 1974).

Neither appellees nor the majority, however, can point to a single case in which federal jurisdiction was created by aggregating a state-law claim with a federal claim falling short of the jurisdictional amount. I have found no such case. Instead, formulations of the aggregation rule by leading commentators — at least those that are not ambiguous, *cf. infra* note 6 — *preclude* aggregation in cases such as this one. Professors Wright and Miller, for instance, state that "[t]he general rule is that in an action involving a single plaintiff and a single defendant, when the basis of jurisdiction is diversity of citizenship *or when each of the claims sought to be joined involves a federal question,* a party may aggregate all the claims he has against an opposing party in order to satisfy the requisite jurisdictional amount." 6 *Wright & Miller* at 805-6 (citations omitted) (emphasis added). *See also* 14 *id.* at 412-13 ("When plaintiff joins several claims against the defendant, the general rule . . . is that the value of all the claims can be added together in determining whether the requisite jurisdictional amount exists. This right of aggregation exists even though one of the claims may be based on diversity of citizenship and one or more may be based on federal question jurisdiction." (citations omitted)); Comment, 53 Tex. L. Rev. 604, 605 (1975) ("[The] aggregation doctrine provides that when diversity of citizenship exists or all claims are federal, a single plaintiff may combine his claims against a single defendant to meet the matter-in-contro-

versy requirement." (citations omitted)).[6] In fact, Professors Wright and Miller have described the relationship between the rule concerning aggregation of claims and the doctrine of pendent jurisdiction in plain terms: "[U]nlike the aggregation of totally unrelated claims, none of which

---

[6]The aggregation rule is also often framed by reference to the rules concerning joinder: all claims that may properly be joined under rule 18, Fed.R.Civ.P. 18, may be aggregated in order to reach the jurisdictional amount. *See,* 14 *Wright & Miller* § 3704; 1 *Moore* ¶ 0.97[1]; 36A *C.J.S. Federal Courts* § 310(6)(a) (1960). Rule 18, read in conjunction with rule 82, permits a plaintiff to join against a defendant all claims over which the court has jurisdiction. Fed.R. Civ.P. 18(a); Fed.R.Civ.P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts."). *See United States v. United Pacific Insurance Co.*, 472 F.2d 792, 794 & n.5 (9th Cir.), *cert. denied*, 411 U.S. 982 (1973). *See generally* 3A *Moore* ¶ 18.07[1.-1]; 6 *Wright & Miller* § 1588. As noted earlier, a federal court has jurisdiction over a state-law claim between nondiverse parties only if it has pendent jurisdiction over the claim. And, in a nondiversity case, a federal court can have pendent jurisdiction over a claim only if it has independently obtained jurisdiction over a federal claim.

The Advisory Committee Notes to the 1966 amendment to rule 18(a) state that rule 18(a) "deals only with pleading" and "does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading." Fed.R.Civ.P. 18 advisory committee note to 1966 amendment. That language seems to indicate that jurisdictional requirements should not be considered in determining whether claims have been properly joined under rule 18; jurisdictional limitations apply, but not by virtue of rule 18. Such a reading of the rule might support the argument that, under the aggregation rule as stated *supra* this note, claims may be aggregated to meet the amount-in-controversy requirement regardless of whether the court has jurisdiction over them. Such an argument, however, is plainly untenable. Even the majority opinion in this case does not contend that, in a nondiversity case, *any* state-law claim, not matter how unrelated, may be aggregated to a federal claim in order to satisfy the jurisdictional amount requirement. Plainly the commenators cited *supra* were taking jurisdictional limitations into account when they referred to rule 18.

meet the requisite amount, a claim joined under the pendent jurisdiction doctrine is brought into the action only when the court's power over the main claim gives it jurisdiction over the entire controversy and the pendent claim bears a strong factual relationship to the main claim." 6 *Wright & Miller* at 816.

The rationale for allowing aggregation only of claims that independently satisfy all jurisdictional requirements but the amount-in-controversy requirement is evident. Congress has determined that certain types of claims merit federal attention; federal claims and claims between citizens of different states are two such types. Congress has also determined, however, that some such claims merit

---

See also Fed.R.Civ. Pro 18(a) advisory committee note 3 ("The provision of this rule for the joinder of claims are subject to Rule 82 (Jurisdiction and Venue Unaffected)").

Of course, if the commentators intended that all jurisdictional requirements to be taken into account, the rule they stated would be meaningless: only those claims that independently met the jurisdictional amount requirement could then be aggregated. What they have meant is that claims that could be joined under the rule 18(a) *without record to the jurisdictional amount requirement* may be aggregated in order to satisfy that requirement. Insofar as such a formulation would allow aggregation of a state-law claim with a federal claim that arises from the same nucleus of operative facts, however, it conflicts with the well-settled principle of pendent jurisdiction described above. I do not believe that those commentators had such a case in mindwhen they stated their rule of aggregation. First, none of the commentators cites a single case allowing aggregation under such circumstances. More important, none of the commentators recognizes a conflict between the rule of aggregation, as he enunciates it, and the principle of pendent jurisdiction described above. Indeed, some state all but explicitly that there is no conflict. *See, e.g.*, 6 *Wright & Miller* at 816. I am therefore confident that they would not quarrel with the following formulation: all claims by a single plaintiff against a single defendant that could be joined under rule 18(a) if they *independently* met all jurisdictional requirements other than the amount-in-controversy requirement may be aggregated in order to reach the jurisdictional amount. That is the rule stated in the text.

federal attention only when they are of a given magnitude. When a plaintiff has two claims each of which is of a type that merits federal attention, but neither of which by itself meets the jurisdictional amount requirement, he is allowed to combine the claims to establish that his case is of the magnitude that merits federal attention. The idea is that two such separate claims are the equivalent of one claim meriting federal attention of the combined magnitude. Although one may quarrel with the wisdom of allowing a plaintiff to come into federal court by combining his claims in that way, *see* 14 *Wright & Miller* at § 3704, one cannot say that the rule is devoid of logic.

The same cannot be said, however, of a rule allowing parties to come into federal court with a claim that is of the type that merits federal attention, but is of insufficient magnitude, and a claim that is not of the type that merits federal attention. However one looks at two such disparate claims, one is left with a case that does not merit federal attention.

In sum, I think it clear that federal jurisdiction cannot be created by aggregating a state-law claim with a federal claim that does not meet the jurisdictional amount requirement — even if the state-law claim arises out of the same nucleus of operative facts as the federal claim. The majority either misinterprets the law as to aggregation of claims or reads a different rule into the jurisdictional amount proviso of section 1337. As I have already stated, however, the legislative history of section 1337 makes it plain that Congress intended that the proviso be interpreted consistently with other jurisdictional amount requirements. Moreover, the only difference between section 1337 and other statutes containing amount-in-controversy requirements makes the requirement *more* stringent in section 1337 cases. Section 1337 requires that "the matter in controversy *for*

each receipt or bill of lading" exceed $10,000. 28 U.S.C. § 1337 (1982) (emphasis added). That language was obviously intended to *narrow* federal jurisdiction in Carmack Amendment cases by prohibiting aggregation of Carmack Amendment claims arising from separate bills of lading. *See Pillsbury Co. v. Atchison, Topeka and Santa Fe Railway Co.*, 548 F. Supp. 28 (D. Kansas 1982). *Cf.* 14 *Wright & Miller* at § 3704 (ordinarily, separate federal claims may be aggregated to meet jurisdictional amount). Clearly, language intended to prevent aggregation of separate Carmack Amendment claims if they relate to different bills of lading cannot support a reading of 1337 as permitting aggregation of Carmack Amendment claims with state-law claims. In fact, the additional language in section 1337 would appear *a fortiori* to preclude any such reading.

II

PREEMPTION

Appellants presented state tort claims for tortious bad faith and intentional infliction of emotional distress in connection with appellees' handling of their Carmack Amendment claim. The majority holds that the Supreme Court's holding in *Adams Express Co. v. Croninger,* 226 U.S. 491 (1913), compels the conclusion that the plaintiffs' state-law claims are preempted by the Carmack Amendment. I believe that *Adams Express* compels no such conclusion and that the state-law claims mentioned above are in fact not so preempted.[7] Accordingly, I dissent from

---

[7]Appellants also presented a claim for fraud in connection with the negotiation of the contract. Specifically, appellants alleged that appellees' agent misrepresented that for an additional fee appellants would be insured. The district court found this claim preempted as well. It relied on cases establishing that shippers are charged with notice of the terms of the tariff schedule, *see American Railway Express Co. v. Daniel,* 269 U.S. 40, 42 (1925), and that "no claim

Part II(b) of the majority's opinion not only because the issue should not have been reached but also because I believe the issue was decided wrongly. I, of course, express no opinion as to the merits — either legal or factual — of the state-law claims.

In *Adams Express,* the Court was faced with a state law prohibiting certain limitations on liability. That state law was inconsistent with the Carmack Amendment, which allows carriers to limit their liability in certain ways. *See Adams Express,* 226 U.S. at 508-12. The Court held that the Carmack Amendment preempted the inconsistent state law.

As the majority notes, there is a conflict among the Circuits regarding whether the Carmack Amendment preempts all state laws governing liability for damages arising from interstate transportation of goods, or merely those state laws that are inconsistent with the Carmack Amendment. *See* cases cited in majority opinion at ___. The majority states that it agrees with the courts that have taken the broader view of the Carmack Amendment's preemptive effect. I believe that it was not necessary for the majority to reach the issue of whether all state laws or just inconsistent ones are preempted. Even if I were to assume that the broader view of the Carmack Amendment's preemptive effect is correct, I would conclude that the plaintiffs' state-law claims are not preempted.

---

for relief can be predicated on a carrier's alleged fraudulent misquotation of tariffs." *See Consolidated Freightways v. Terry Truck, Inc.*, 612 F.2d 465, 466 (9th Cir. 1980) (claim under section 217(b) of the Motor Carriers Act, 49 U.S.C. § 317(b) (1976)). Whether appellants' fraud claim is preempted is, I think, a much closer question than whether the post-delivery tort claims are preempted. Had the district court had jurisdiction, its decision on this issue might well have been correct. However, because the question is not properly before us and because the majority gives only cursory consideration to the issue, and relegates the entire discussion to a footnote, I see no reason to consider the question further here.

As the Supreme Court has recently reiterated, "[i]f Congress evidences an intent to occupy a given field, any state law *falling within that field* is preempted." *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 621 (1984) (emphasis added). *See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713, 1722 (1983); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Carmack Amendment thus preempts at most only those state laws that fall within the field Congress may have intended to occupy when it enacted the statute. I think it clear that in enacting the Carmack Amendment Congress was not addressing the problem of liability for wrongful conduct in connection with the post-delivery handling of claims. Because plaintiffs' state-law claims fall outside of the field that the Carmack Amendment addresses, those claims are not preempted.

As the Court said in *Adams Express*, the Carmack Amendment essentially had four features: (1) it required carriers to issue a receipt or bill of lading; (2) it made initial carriers liable to the lawful holder of the receipt or bill of lading "for any loss, damage, or injury" the carrier caused to property represented by the receipt or bill of lading; (3) it made subsequent carriers liable for losses they caused; and (4) it declared that the liabilities it imposed could not be avoided by contract. Act of June 29, 1906, 34 Stat. 584, c. 3591. *See Adams Express*, 226 U.S. at 504. The Carmack Amendment thus did not address the question of liability for tortious conduct on the part of the carrier after the delivery of the property. Indeed, the Supreme Court itself recognized the limited "field" the Carmack Amendment addressed. In *Adams Express*, after stating that the law "supersedes all the regulations and policies of a particular State *upon the same subject* . . .," 226 U.S. at 505 (emphasis added), the Court stated that the Carmack

Amendment "embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract." *Id.*

Appellants' state-law claims do not arise under the bill of lading. Nor do appellants allege a liability that would ordinarily be governed by the bill of lading. Rather, appellants seek to impose on appellee an entirely separate liability that goes beyond any that could arise under the bill of lading — a liability for tortious bad faith and intentional infliction of emotional distress.[8] Although the torts are alleged to have occurred in connection with appellee's refusal to settle a dispute relating to claims that may have arisen under the bill of lading, the tort law claims are wholly distinct from any Carmack Amendment claims. Resolution of the tort-law claims has little if anything to do with the merits of any claims under the bill of lading. The state-law claims, therefore, fall outside the field covered by the Carmack Amendment as described by the Supreme Court in *Adams Express.* Far from compelling the majority's holding, *Adams Express* supports the opposite conclusion.[9]

Nor do any of the other cases the majority cites support its conclusion. The majority states that "it has long been

---

[8]As the Supreme Court has stated, the states have a "substantial interest" in protecting their citizens from the type of tortious behavior complained of here. *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 302 (1977) (holding that federal labor laws do not preempt state-law remedies for intentional infliction of emotional distress, even if the alleged acts occurred in connection with the settlement of a labor dispute). This strong interest of the states is an additional reason why I am reluctant to conclude that Congress intended the Carmack Amendment to preempt the state remedies appellants seek.

[9]In post-*Adams Express* amendments to the Carmack Amendment, Congress provided expressly for a private right of action, enacted

established that the Carmack Amendment embraces more than merely recovery for damages to the shipment itself." Majority opinion at . . . That observation, while correct, fails to support the holding that the Carmack Amendment embraces the subject of *post-delivery* conduct on the part of the carrier. The cases cited by the majority establish only that state laws regarding liability for delay in the delivery of the goods are preempted. *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936); *New York, Philadelphia & Norfolk R.R. Co. v. Peninsula Produce Exchange,* 240 U.S. 34 (1916). Delivery of goods is certainly an integral part of a carrier's undertaking under a bill of lading, and liability for delay in delivery is generally a matter governed by the contract of carriage. Thus, the issue involved in the cases the majority cites was squarely governed by the Court's holding in *Adams Express* that the Carmack Amendment "embrace[d] the subject of the liability of the carrier under a bill of lading . . . ." 226 U.S. at 505. Moreover, the very terms of the provision of the removal statute that is specifically applicable to Carmack Amendment cases compelled the conclusion the Supreme Court reached in those cases, for that provision refers to recovery under the Carmack Amendment of "damages for *delay,* loss or injury" to shipments. 28 U.S.C. § 1445(b) (1982) (emphasis added). By contrast, neither express statutory terms nor binding procedent nor common sense leads to the conclusion that the *post-delivery* relationship

---

certain venue requirements, and prohibited carriers from allowing shippers less than nine months in which to file a claim or less than two years in which to bring a civil action. Neither appellees nor the majority, however, points to any evidence that Congress, in enacting those amendments, intended to preempt state tort laws insofar as they apply to carriers' conduct towards shippers in connection with Carmack Amendment dispute settlement. The enactment of those provisions, without more, no more compels such a conclusion than would, for instance, the enactment of a federal statute of limitations for bringing Carmack Amendment claims.

between a carrier and a shipper is preempted by the Carmack Amendment.[10] Accordingly, I would hold that the Carmack Amendment does not preempt appellant's post-delivery claims.[11]

CONCLUSION

Because, in the absence of diversity of citizenship, state-law claims may never be aggregated to federal claims in order to reach the jurisdictional amount, the district court lacked subject-matter jurisdiction over this case. It should therefore have remanded the entire action to the state court without considering the federal preemption issue. Furthermore, its conclusion that the state-law claims were preempted by the Carmack Amendment was erroneous as a matter of law.

---

[10]The district court relied on *Sylgab Steel & Wire Corp. v. Strickland Transportation Co.*, 270 F. Supp. 264 (E.D.N.Y. 1967). That case, however, involved a post-delivery agreement whereby the carrier undertook to repair goods it had damaged during carriage. I agree with the *Sylgab* court that such an agreement is preempted by the Carmack Amendment, for it is essentially an agreement governing the extent of the carrier's liability for damages to the goods—the very type of agreement involved in *Adams Express*. The district court below thought that *Sylgab* was applicable here because the agreement in that case was an agreement concerning the settlement of the dispute. The district court was mistaken. The agreement in *Sylgab* purported to govern the *substance* of the carrier's liability for damaging the goods. Here, plaintiffs seek to impose an entirely separate liability on the carrier, a liability for the tortious handling of the claim. *Sylgab*, therefore, has little in common with this case.

[11]The majority does not consider whether the post-delivery state-law claims are preempted by section 7(a)(1) of the Household Goods Transportation Act of 1980, Pub. L. No. 96-454 § 7(a)(1), 94 Stat. 2016 (codified at 49 U.S.C. § 11711 (Supp. V 1981)). Appellees state that the Act is "not directly pertinent to the issues on this appeal," although it "relates to the Sixth Cause of action" (attorney's fees). Since we do not address the sixth cause of action on this appeal, I agree that we need not consider whether the Act has any relevance to the preemption issue.

APPENDIX E

ORDER

No. 83-5911

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES K. T. HUNTER and
GINA F., BRANDT,
Plaintiffs-Appellants,

vs.

UNITED VAN LINES, etc. et al.,
Defendants-Appellees.

FILED
July 02, 1984
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

BEFORE: SNEED and REINHARDT Circuit Judges,
and EAST, District Judge

The opinion filed June 25, 1984 is vacated.

APPENDIX F

ORDER

No. CV 82-1137 RG

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES K. T. HUNTER and
GINA F. BRANDT,
Plaintiffs,

v.

UNITED VAN LINES, INC.,
a Missouri corporation, et al.,
Defendants.

Filed March 30, 1983.

This motion for partial summary judgment is brought by defendant United Van Lines (United) against plaintiffs James K.T. Hunter and Gina F. Brandt (the Hunters). United seeks judgment in its favor as to counts one to five of the complaint. United asserts that these counts, requests for relief based on state common law principles, are preempted by the Interstate Commerce Act and specifically the Carmack Amendment thereto (49 U.S.C. § 11707). The question here is whether there is no genuine issue of material fact with respect to these counts and therefore United is entitled to a judgment as a matter of law.

The facts in this case involve a bill of lading for the interstate transportation of household goods written by United and signed by Nancy Jukes. The Hunters shipped their household goods on the same bill of lading with the Jukes' goods. Upon arrival in Los Angeles, California, household goods belonging to both parties had been damaged. United obtained estimates on the extent of the damage from Trilco, Inc. and John Trlica, co-defendants in this case. United then offered both the Jukes and the Hunters $585.50 in full settlement for the damage. The

Jukes were willing to accept their portion of the settlement, but the Hunters maintained that the offer was not representative of the loss of the actual value for the damaged property. Since United refused to come to a separate agreement with the Hunters, the Jukes lawfully assigned their claim to them. Plaintiffs brought this suit when they were unable to reach a settlement with defendants.

I

Plaintiffs' first cause of action is for breach of contract relative to the actual damage to their property. The United States Supreme Court has ruled that the measure of liability under a bill of lading between a carrier covered by the Act and a shipper must be regarded as a federal question. (*Southern R.Y. v. Prescott*, 240 U.S. 632, 639 (1916)). The Ninth Circuit rule on such liability is: "The Carmack Amendment to the Interstate Commerce Act makes a carrier . . . liable for damages it causes to property it transports in the amount of the 'actual loss of injury to the property.' 49 U.S.C. § 11707(a)(1)." (*Contempo Metal Furn., Etc. v. East Tex. Mrt., Etc.*, 661 F.2d 761, 764 (9th Cir. 1982)).

The dispute properly comes before this court under the Carmack Amendment (49 U.S.C. § 11707). In the court's view a question of fact exists over the actual damage issue, with plaintiffs seeking a substantial sum of money and the defendant offering a much smaller amount. As there is a genuine issue of material fact present in this controversy, summary judgment cannot be granted on the first cause of action.

II

As authority for relief on counts two to five, plaintiffs rely on a proviso of the Carmack Amendment stated in 49 U.S.C. § 20(11), which allows for remedies or rights of

action which the shipper had under prior law. In October 1978, Congress amended and recodified the Interstate Commerce Act. In 1980, the Carmack Amendment, now 49 U.S.C. § 11707, was further amended. The effect of the amendments and recodification of the Act was to simplify the language and eliminate obsolete terms and statutes. The proviso relied on by plaintiffs no longer exists as part of the Carmack Amendment. (*See: Adams v. Croninger*, 266 U.S. 491 (1913); *Missouri Pac. R.R. Co. v. Porter*, 273 U.S. 341 (1927); *American Synthetic Rubber Corp. v. Louisville & N.R.R. Co.*, 422 F.2d 462 (6th Cir. 1970); *W. D. Lawson & Co. v. Penn Central Co.*, 456 F.2d 419 (6th Cir. 1972); *Fulton v. Chicago, Rock Island & Pacific Railroad*, 481 F.2d 326 (8th Cir. 1973); *Sweeney v. Morgan Drive Away, Inc.*, 349 F.Supp. 1216 (D.C. Colo. 1975). The above cases are examples of the judicial reasoning which led to the obsolence of the proviso.)

Plaintiffs are not entitled to state common law remedies in an action controlled by the Carmack Amendment unless it can be demonstrated that the statute's function terminates upon delivery of the household goods at their destination.

III

Plaintiffs' second, third, and fifth causes of action seek recovery against United on various common law charges resulting from the parties' interactions during settlement discussions. Under the Supreme Court decision in *S.E. Express Co. v. Pastime Co.*, 299 U.S. 28 (1936), the Carmack Amendment was established to cover all transactions between the parties including delivery at the agreed destination. The court in *Sylgab Steel & Wire Corp. v. Strickland Transportation Co.*, 270 F. Supp. 264 (D.C. E.D. N.Y. 1967), properly found that the Carmack Amendment had authority over "all suits and proceedings arising under any law

regulating commerce." (*Id.* at 270). The court went on to state:

> Where the contract between carrier and shipper or receiver to provide compensation for damaged goods is so closely connected to the agreement embodied in the bill of lading as to constitute at most a clarification or modification of that agreement it is governed by federal law. The federal pre-emption tent over the main attraction, the bill of lading, covers what is essentially a side-show, the agreement by the carrier to repair.

Id.

Repair of damage to property is the last encounter in the shipper/carrier relationship. It is therefore necessary for the statute to cover all related matters even up to the repair of damage, or settlement for monetary compensation for the damage. This court agrees with the court in the *Sylgab Steel* case. The federal statute includes that portion of the contract between defendant United and plaintiffs which involves repairs. Therefore, state law causes of action grounded in settlement disputes are preempted. Plaintiffs are limited by the Carmack Amendment to actual loss or injury to the property and whatever other compensation may be available under the statute.

IV

Plaintiffs' fourth cause of action is for fraud. While fraud is a common law cause of action, its seriousness merits a separate discussion. The allegation is that defendant United misrepresented to plaintiffs that for $250 the shipment would be insured for up to $50,000 against damage. In fact the money did not purchase an insurance policy by permitted the Hunters to declare a value for their property up to $50,000. The Hunters further maintain that if they cannot receive the insurance protection they thought

they purchased, they should be able to receive the benefits of an option available under the tariff, about which they were never informed.

The nature of the declared valuation and any option available to a shipper for the further protection of his property are set out in the carrier's field tariff. A carrier is obligated to post all tariffs and make them accessible to the public. (49 CFR §§ 1305.0-1305.8) "[T]he court notes that shippers are charged with notice of the terms, conditions, and regulations contained in the tariff schedule pertaining to a carrier's liability which in turn, affect the rates charged for the carriage of goods. *American Railway Express Co. v. Daniel*, 269 U.S 40, 42 (1925)." (D.C. N.D. Geog. 1979). *Service, Inc.*, 478 F. Supp. 49, 51 (D.C. N.D. Geog. 1979). The Hunters are presumed to have knowledge of the tariff provisions. (*Pittsburgh & c. Ry. Co. v. Fink*, 250 U.S. 577 (1919).

Further, a carrier cannot be bound by a misrepresentation by one of its agents. Enforcing a misrepresentation would constitute a prohibited change in a filed tariff. "It is clear that with respect to the service governed by Federal Statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations (citations omitted)." (*Southern Ry. v. Prescott*, 240 U.S. 634, 638 (1915)). "The railroad [as carrier] itself could neither intentionally nor inadvertently through waiver or negligence, accept and perform a request which was not warranted by an applicable tariff and was inherently preferential or otherwise discriminatory." (*Atchison & T. & S. Ry. Co. v. Springer*, 172 F. 2d 346, 349 (7th Cir. 1949)). To recognize the alleged misrepresentation and grant the plaintiffs the rights — under an insurance policy would discriminate against others who are bound by the tariff. Further, the Ninth Circuit has ruled "that no claim for relief can be predicated on a carrier's alleged fraudulent misquotation of tariffs."

(*Consolidated Freightways v. Terry Tuck, Inc.*, 612 F.2d 465, 466 (9th Cir. 1980)). While this case is concerned with the Motor Carriers Act, the same principle applies to the Carmack Amendment.

Plaintiffs are limited by the statute and cannot receive damages against United for alleged fraudulent activities.

V

Based on the foregoing, this court now concludes that defendant's motion for partial summary judgment is denied in part, and granted in part:

(a) Denied as to the first cause of action against United and alleged employees and agents Crown Transfer and Storage, Belmont Van and Storage Co., and John Falbe, for breach of contract.

(b) Granted as to the second cause of action against United and alleged employees and agents Crown Transfer and Storage, Belmont Van and Storage Co., and John Falbe, for tortious bad faith.

(c) Granted as to the third cause of action against United and alleged employees and agents Crown Transfer and Storage, Belmont Van and Storage Co., and John Falbe, for intentional interference with contractual relations.

(d) Granted as to the fourth cause of action against United and alleged employees and agents Crown Transfer and Storage, Belmont Van and Storage Co., and John Falbe, for fraud.

(e) Granted as to the fifth cause of action against United and alleged employees and agents Crown Transfer and Storage, Belmont Van and Storage Co., and John Falbe, for intentional infliction of emotional distress.

DATED: 30 March 1983

RICHARD A. GADBOIS, JR.
United States District Judge

APPENDIX G

ORDER

No. CV 82-1137 RG

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES K. T. HUNTER and
GINA F. BRANDT,
Plaintiffs,

v.

UNITED VAN LINES, INC., a
Missouri corporation, TRILCO, INC.,
a California corporation,
JOHN TRLICA, CROWN TRANSFER & STORAGE,
a California corporation,
BELMONT VAN & STORAGE COMPANY,
a California corporation,
JOHN FALBE and DOES 1 through 16, inclusive
Defendants.

FILED

April 29, 1983

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

The court, having read the papers submitted by counsel, and having heard oral argument, and other good cause appearing therefor, it is

ORDERED that those causes of action involving United Van Lines and those causes of action involving Trilco, Inc. and John Trlica are to be remanded to state court for further determination on the pendent state claims and the issue of liability for damaged goods. The court finds that jurisdiction of claims brought against Trilco, Inc. and John

Trlica rightfully belong in state court under § 1441(c) of the Federal Rules of Civil Procedure. The statute decrees that the court "in its discretion, may remand all matters not otherwise within its original jurisdiction." The court thus exercises its discretion.

The court also finds that the jurisdiction of those claims brought against United Van Lines lies with the state court. "A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipment, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interests and costs." 28 U.S.C. § 2445(b). United Van Line's Motion for Partial Summary Judgment, filed March 30, 1983, granted in part and denied in part, limited this case to a determination of liability on damage of property to less than $3,000 plus attorneys' fees.

DATED: Apr. 29, 1983

RICHARD A. GADBOIS, JR.
United States District Judge

APPENDIX H

MEMORANDUM AND ORDER

No. WEC 072311

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JAMES K. T. HUNTER, et. al.,
Plaintiffs,

vs.

UNITED VAN LINES, INC., etc., et al.
Defendants.

FILED

October 24, 1983

Plaintiffs' complaint was originally filed with this court in February 1982. Thereafter the case was removed to the United States District Court where, after the parties filed in excess of 197 documents, the case was transferred back to this court.

Facts stated in the order of United States District Court Judge Richard A. Gadbois, Jr., filed March 30, 1983, are pertinent to the present motions pending in this court since they involve the same issues. Relevant portions are quoted therefrom:

> "The facts in this case involve a bill of lading for the interstate transportation of household goods written by United and signed by Nancy Jukes. The Hunters shipped their household goods on the same bill of lading with the Jukes' goods."

[It should be added here that the payment for the shipment of the Jukes' goods was made by the employer of Mr. Jukes and the Hunters do not appear anywhere in the bill of lading as shippers. In effect, the Hunters were freeloaders and to whom none of the defendants owed any contractual duty.]

"Upon arrival in Los Angeles, California, household goods belonging to both parties had been damaged. United obtained estimates on the extent of the damage from Trilco, Inc. and John Trlica, co-defendants in this case. United then offered both the Jukes and the Hunters $585.50 in full settlement for the damage. The Jukes were willing to accept their portion of the settlement, but the Hunters maintained that the offer was not representative of the loss of the actual value for the damaged property. Since United refused to come to a separate agreement with the Hunters, the Jukes lawfully assigned their claim to them."

[Again, by interpolation]: Judge Gadbois did not discuss nor apparently have before him the fact that both Hunters were lawyers and by procuring an assignment of the Jukes' claim to them with the intention to bring suit thereon they were in clear violation of Business and Professions Code section 6129 which provides: "Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereton, is guilty of a misdemeanor."

Consequently under California champerty law the assignment is void and no action thereon may be maintained. The facts in *Martin v. Freeman* (1963) 216 Cal.App.2d 639, on which the plaintiffs rely, are readily distinguishable from the facts herein. There can be no question in this case that the plaintiffs, in clear violation of Business and Professions Code section 6129, purchased the Jukes' claim in order to bring action thereon. They so admitted on argument.

The defendants Trilco, Inc. and John Trlica who were retained by United to evaluate the extent of the damage did so. They submitted a report to United who then offered to settle the claims with Nancy and John Jukes and the Hunters.

At this point, it should be noted that there is not a scintilla of evidence nor any reasonable inference that the defendants Trilco, Inc. and John Trlica conspired with United deliberately to submit an undervalued report. For this reason the motion of the defendants Trilco, Inc. and John Trlica for summary judgment dismissing the second, third and fifth causes of action is granted.

It should be further observed at this point that those causes of action together with the fourth cause of action were dismissed by Judge Gadbois on a motion for summary judgment made by United in the federal court action which has been appealed by the plaintiffs.

The motion of the defendant United Van Lines, Inc. for summary judgment on the sixth cause of action for attorney's fees will be granted on the grounds and for the reasons set forth in defendant's motion. More particularly, plaintiffs were aware of the provisions of 49 U.S.C. section 11711 and they had available to them and were advised by the Interstate Commerce Commission that the arbitration program was available but they consciously chose not to use it, apparently for the reason that they felt that section 11711 did not allow some of the claims plaintiffs wanted to prosecute, among others, for punitive damages, emotional distress and attorney's fees. Because the plaintiffs chose not to use the Dispute Settlement Program for Household Goods Carriers (49 U.S.C. § 11711) they cannot now claim any entitlement to attorney's fees, and, as a consequence, are not entitled to claim attorney's fees under 49 U.S.C. section 11711. As defendant United points out, it would be absurd and unjust to conclude that the plaintiffs can both consciously choose to avoid arbitration under 49 U.S.C. section 11711 and at the same time claim attorney's fees awardable because of the absence of such a program. That program was admittedly available to the plaintiffs before

this action was commenced but they elected not to proceed thereunder.

Defendant United also seeks summary judgment on the first cause of action where damages are claimed by the plaintiffs in their own right and as assignees of the Jukes for $2,921.60. The defendant's motion for summary judgment on the first cause of action is granted for the amount sought by plaintiffs in the said sum of $2,921.60 together with the further sums offered by the defendant as follows: sales taxes $175.30, pre-judgment interest from August 12, 1981 through September 1, 1983 at 7% per annum in the sum of $444.85, for a grand total of $3,541.75.

However, because of the frivolous nature of the plaintiffs' claim and the doubtful validity of their claim because of their violation of Business and Professions Code section 6129, the court is awarding the defendant United sanctions in the amount of $5,000 for which it shall have separate judgment. This case should have originally been brought in the Municipal Court instead of burdening both the federal court and Superior Court with this questionable lawsuit, in which the plaintiff attorney, James K. T. Hunter, expended in excess of 800 hours so that he may claim enormous attorney fees in this *de minimis* litigation.

In view of the above rulings, plaintiffs' motions for order clarifying discovery, etc., are moot.

DATED: October 24, 1983

LAURENCE J. RITTENBAND, Judge

APPENDIX I

ORDER

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

WEC 72311

HUNTER, JAMES K. T., et al
Plaintiff,

vs.

UNITED VAN LINES, INC., et al
Defendant.

HONORABLE L. J. RITTENBAND, JUDGE

D. TSCHEKALOFF, DEPUTY CLERK

Date DEC. 12, 1984

The Court finds that the Judgment in Favor of Defendant United Van Lines, Inc., signed on January 20, 1984, was inadvertently not file stamped, nor was it entered on the Register of Actions. The Court orders that the above document be file stamped and entered on the Register as of the January 20, 1984, date.

A copy of this minute order is mailed to counsel for defendant United Van Lines who is directed to give notice of the judgment.

APPENDIX J

JUDGMENT IN FAVOR OF DEFENDANT UNITED VAN LINES, INC.

CASE NO.: WEC 072311

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

JAMES K. T. HUNTER, et al.,
Plaintiffs,

vs.

UNITED VAN LINES, INC., et al.,
Defendants.

COUNTY CLERK
WEST

ORIGINAL FILED

JAN. 20, 1984

On September 30, 1983 the motions of Defendant United Van Lines, Inc. for Summary Judgment on Plaintiffs' Sixth Cause of Action, for entry of judgment on Plaintiffs' First Cause of Action in the interest of avoiding further costly litigation, and United Van Lines, Inc.'s request for attorneys' fees and costs pursuant to Code of Civil Procedure § 128.5 came on regularly for hearing before the Honorable Laurence J. Rittenband, Judge, presiding, with Plaintiffs appearing by their attorney, James K. T. Hunter of Hill, Wynne, Troop & Meisinger, and Defendant United Van Lines, Inc. appearing by its attorney Grover A. Perrigue, III; and the Court having fully considered all moving and opposing papers on file and having heard extensive argument of the facts and law thereafter issued its order of October 24, 1983 which disposed of all issues between the parties, and which is incorporated herein by reference. Thereafter, Plaintiffs timely filed a motion for reconsideration of this order which came on for regularly for hearing before the Court on January 13, 1984, and the Court having

considered all evidence presented by the parties pertaining to the motion to reconsider, it the conclusion and finding of this Court that:

1. There being no triable issue of material fact as to the issues raised by the Sixth Cause of Action, Defendant United Van Lines, Inc.'s summary judgment is granted and Plaintiffs shall take nothing under this Cause of Action.

2. As to the Plaintiffs' Second through Fifth Causes of Action, these were determined adversely to Plaintiffs by the United States District Court, Central District of California prior to the matter being remanded to this Court and therefore Plaintiffs shall take nothing by reason of those Causes of Action.

3. As to Plaintiffs' First Cause of Action, Defendant United Van Lines, Inc. has, to avoid further harassment and expense, offered to stipulate to judgment in favor of Plaintiffs in the sum of $3,541.75 instead of proceeding with litigation of the material issues of fact as to both liability and damages on this cause of action; and the Court acting solely upon the offer of Defendant United Van Lines, Inc. and in order to bring this matter to a final termination awards Plaintiffs $3,541.75 under this Cause of Action.

4. However, as to the case in general and particularly as to the proceedings before this Court by Plaintiffs since this case was remanded and for the reasons set forth in the Order of October 24, 1983, the Court, acting pursuant to its authority under Code of Civil Procedure §§ 128 and 128.5, awards Defendant United Van Lines, Inc. the sum of $5,000 to cover a portion of its cost of suit incurred in the defense of this action which is being maintained by Plaintiffs not in good faith to recover on what legal cause they may have but rather

to "teach carriers a lesson" by subjecting Defendants to the expense of legal proceedings not necessary or warranted under the circumstances given the maximum amount in controversy as disclosed by the undisputed evidence presented to this Court.

5. Further, upon reconsideration on January 13, 1984, as argued by the Plaintiffs and Defendant United Van Lines, Inc., the additional sum of $2,500 is awarded to Defendant United Van Lines, Inc. The grounds for Plaintiffs' motion were devoid of any merit. This award reflects but a portion of the expenses reasonably incurred in the defense of this action as set forth above and as memorialized in the Order of October 24, 1983.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT Plaintiffs take nothing by reason of their complaint and that Defendant United Van Lines, Inc. have judgment against Plaintiffs in the amount of $3,958.25, plus its costs of suit in the amount of

DATED: January 20, 1984

LAURENCE J. RITTENBAND, JUDGE
Superior Court for the County of Los Angeles

APPENDIX K

28 USCS § 1337

Jurisdiction and Venue.

§ 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49 [49 USCS § 11707], only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49 [49 USCS § 11707], originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title [28 USCS §§ 1581 et seq.].

(As amended Oct. 20, 1978, P. L. 95-486, § 9(a), 92 Stat. 1633; Oct. 10, 1980, P. L. 96-417, Title V, § 505, 94 Stat. 1743; Jan. 12, 1983, P. L. 97-449, § 5(f), 96 Stat. 2442.)

§ *1441. Actions removable generally*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter [28 USCS § 1446(b)] may be enlarged at any time for cause shown. (June 25, 1948, c. 646, § 1, 62 Stat. 937; Oct. 21, 1976, P. L. 94-583, § 6, 90 Stat. 2898.)

28 USCS § 1445

Jurisdiction and Venue.

§ 1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45 [45 USCS §§ 51 et seq.], may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of title 49 [49 USCS § 11707], may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(As amended Oct. 17, 1978, P. L. 95-473, § 2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, P. L. 95-486, § 9(b), 92 Stat. 1634.)

49 USCS § 20

Transportation.

(11) Liability of initial and delivering carrier for loss; Limitation of liability; Notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury

to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, That if the loss, dam-

age, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this part to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and

mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, That all action brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: Provided, further, That it shall be unlawful for any receiving or delivering common carrier to provide by rule, contract, regulations, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: And provided further, That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: And provided further, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part provided.

49 USCS § 10730

Rates and Tariffs.

§ 10730. Rates and liability based on value

(a) The Interstate Commerce Commission may require or authorize a carrier (including a motor common carrier

of household goods but excluding any other motor common carrier of property and excluding any rail carrier) providing transportation or service subject to its jurisdiction under subchapter I, II, or IV of chapter 105 of this title [40 USCS §§ 10501 et seq., 10521 et seq., or 10561 et seq.], to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation. A rate may be made applicable under this section to livestock only if the livestock is valuable chiefly for breeding, racing, show purposes, or other special uses. A tariff filed with the Commission under subchapter IV of this chapter [49 USCS §§ 10761 et seq.] shall refer specifically to the action of the Commission under this section.

(b)(1) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] may, subject to the provisions of this chapter (including the general tariff requirements of section 10762 of this title [49 USCS § 10762]), establish rates for the transportation of property (other than household goods) under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(2) Before a carrier may establish a rate for any service under paragraph (1) of this subsection, the Commission may require such carrier to have in effect

and keep in effect, during any period such rate is in effect under such paragraph, a rate for such service which does not limit the liability of the carrier.

(c) A rail carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property.

(As amended July 1, 1980, P.L. 96-296, § 12, 94 Stat. 802; Oct. 14, 1980, P.L. 96-448, Title II, § 211(a), (b), 94 Stat. 1911.)

§ *10761. Transportation prohibited without tariff*

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter [49 USCS §§ 10761 et seq.]. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is con-

sistent with the public interest and the transportation policy of section 10101 of this title [49 USCS § 10101]. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers. (Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1394).

§ *10762. General tariff requirements*

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title [49 USCS § 10922(b)(4)(E)] apply or under a permit to which the provisions of section 10923(b)(5) of this title [49 USCS § 10923(b)(5)] apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 [49 USCS §§ 10521 et seq., 10541 et seq., or 10561 et seq.] shall be stated in money of the United States. A tariff filed by a motor or wrater contract carrier or by a freight forwarder providing transportation or service subject to the juisdiction of the Commission under subchapter II, III, or IV of that chapter [49 USCS § 10521 et seq., 10541 et seq., or 10561 et seq.], respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspections under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter [49 USCS §§ 10501 et seq., 10541 et seq., or 10561 et seq.], but those tariffs must identify plainly —

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter [49 USCS §§ 10501 et seq.];

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or

IV of that chapter [49 USCS §§ 10541 et. seq. or 10561 et seq.];

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter [49 USCS §§ 10501 et. seq.] shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title [49 USCS §§ 10521 et seq. or 10541 et seq.] proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a

notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier and motor common carrier of passengers with respect to special or charter transportation, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title [49 USCS § 10713] shall become effective in accordance with the provisions of such section. In the case of a motor common carrier of passengers, a proposed rate change resulting in an increased rate or a new rate applicable to special or charter transportation shall not become effective for 30 days after the notice is published, and a proposed rate change resulting in a reduced rate applicable to special or charter transportation shall not become effective for 10 days after the notice is published."

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing trans-

portation subject to its jurisdiction under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept open for public inspection. However, the Commission shall require that all rates of rail carriers and rail rate-making associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commisison may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incorporated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

(f) The Commission may grant relief from this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title [49 USCS § 10101]. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers on its own initiative for a water contract carrier or group of water contract carriers.

(g) The Commission shall streamline and simplify, to the maximum extent practicable, the filing requirements

applicable under this section to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title [49 USCS § 10922(b)(4)(E)] apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title [49 USCS § 10923(b)(5)] apply. (As amended July 1, 1980, P.L. 96-296, § 5(c), 94 Stat. 796; Oct. 14, 1980, P.L. 96-448, Title II, § 216, 94 Stat. 1915; Sept. 20, 1982, P.L. 97-261, § 12(b), 96 Stat. 1113).

49 USCS § 11707

Enforcement.

§ 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title [49 USCS §§ 10501 et seq., 10521 et seq., or 10561 et seq.] shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV [49 USCS §§ 10501 et seq., 10521 et seq., or 10561 et seq.] are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the

United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title [49 USCS §§ 10761 et seq.]. Failure to issue a receipt or bill of lading does not affect liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] to receive property from a consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passenger trains, boats, or motor vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title [49 USCS § 10730].

(d)(1) A civil action under this section may be brought against a delivering carrier (other than a rail carrier) in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(2)(A) A civil action under this section may only be brought —

(i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(B) A civil action under this section may be brought in a United States district court or in a State court.

(C) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice. For the purposes of this subsection —

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the

claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(As amended June 3, 1980, P.L. 96-258, § 1(14), 94 Stat. 427; July 1, 1980, P.L. 96-296, § 26(b), 94 Stat. 818; Oct. 14, 1980, P.L. 96-448, Title II, § 211(c), 94 Stat. 1911.)

49 USCS § 11711

Enforcement.

§ 11711. Dispute settlement program for household goods carriers

(a)(1) One or more motor common carriers providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] who want to establish a program to settle disputes between such carriers and shippers of household goods concerning the transportation of household goods may submit an application for establishing such program to the Commission. Such application shall be in such form and contain such information as the Commission may, by regulation, require. The Commission shall review and approve, in accordance with the provisions of this section, each application submitted under this subsection.

(2) The Commission shall approve, at least within 45 days of its filing, any application to establish a program for settling disputes concerning the transportation of household goods which meets the requirements of subsection (b) of this section.

(3) The Commission may investigate at any time the functioning of any program approved under this

section and, after notice and an opportunity for a hearing, may suspend or revoke its approval for failure to meet the requirements of this section and such regulations as the Commission may issue to carry out the provisions of this section.

(b) No program for settling disputes concerning the transportation of household goods may be approved under this section unless the program is a fair and expeditious method for settling such disputes and complies with each of the following requirements and such regulations as the Commission may issue:

(1) The program is designed to prevent a carrier from having any special advantage in any case in which the claimant resides or does business at a place distant from the carrier's principal or other place of business.

(2) The program provides for adequate notice of the availability of such program, including a concise easy-to-read, accurate summary of the program and disclosure of the legal effects of election to utilize the program. Such notice must be given to persons for whom household goods are to be transported by the carrier before such goods are tendered to the carrier for transportation.

(3) Upon request of a shipper, the carrier must promptly provide such forms and other information as are necessary for initiating an action under the program to resolve a dispute.

(4) Each person, authorized pursuant to the program to arbitrate or otherwise settle disputes, must be independent of the parties to the dispute and must be capable, as determined under such regulations as the Commission may issue, to resolve such disputes

fairly and expeditiously. The program must ensure that each person chosen to settle the disputes is authorized and able to obtain from the shipper or carrier any material and relevant information to the extent necessary to carry out a fair and expeditious decision-making process.

(5) No fee for instituting a proceeding under the program may be charged the shipper; except that, if the program is binding solely on the carrier, the shipper may be charged a fee of not more than $25 for instituting a proceeding under the program. In any case in which a shipper is charged a fee under this paragraph for instituting a proceeding under the program and such dispute is settled in favor of the shipper, the person settling the dispute must refund such fee to the shipper unless the person settling the dispute determines that such refund is inappropriate.

(6) The program must not require the shipper to agree to utilize the dispute settlement program prior to the time that a dispute arises.

(7) The program may provide for an oral presentation of a dispute concerning transportation of household goods by a party to the dispute (or a party's representative), but such oral presentation may be made only if all parties to the dispute expressly agree to such presentation and the date, time, and location of such presentation.

(8) Any person settling a dispute concerning transportation of household goods under the program must, as expeditiously as possible but at least within 60 days of receipt of written notification of the dispute, render a decision based on the information gathered, except that, in any case in which a party to the dispute fails to provide in a timely manner any information

concerning such dispute which the person settling the dispute may reasonably require to resolve the dispute, the dispute settler may extend such 60-day period for a reasonable period of time. A decision resolving a dispute may include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, and compensation for damages.

(c) Materials and information obtained in the course of a decisionmaking process to settle a dispute under a dispute setttlement program approved under this section may not be used to bring an action under section 11910 of this title [49 USCS § 11910].

(d) In any court action to resolve a dispute between a shipper of household goods and a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees if --

(1) the shipper submits a claim to the carrier within 120 days after the date the shipment is delivered or the date the delivery is scheduled, whichever is later;

(2) the shipper prevails in such court action; and

(3)(A) no dispute settlement program approved under this section was available for use by the shipper to resolve the dispute; or

(B) a decision resolving the dispute was not rendered under a dispute settlement program approved under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection; or

(C) the court proceeding is to enforce a decision rendered under a dispute settlement program approved under this section and is instituted after the period for performance under such decision has elapsed.

(e) In any court action to resolve a dispute between a shipper of household goods and a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] concerning the transportation of household goods by such carrier, such carrier may be awarded reasonable attorney's fees by the court only if the shipper brought such action in bad faith —

(1) after resolution of such dispute under a dispute settlement program approved under this section; or

(2) after institution of a proceeding by the shipper to resolve such dispute under a dispute settlement program approved under this section but before (A) the period provided under subsection (b)(8) for resolution of such dispute (including, if applicable, an extension of such period under such subsection) ends, and (B) a decision resolving such dispute is rendered under such program.

(f) The provisions of this section shall apply only in the case of collect-on-delivery transportation of those types of household goods described in section 10102(11)(A) of this title [49 USCS § 10102(11)(A)].

(Added Oct. 15, 1980, P. L. 96-454, § 7(a)(1), 94 Stat. 2016; Sept. 20, 1982, P.L. 97-261, § 6(d)(2), 96 Stat. 1107.)

TITLE 49 CODE OF FEDERAL REGULATIONS

Part 1005 — Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Proceedings Salvage.

Sec.

1005.1 Applicability of regulations.
1005.2 Filing of claims.
1005.3 Acknowledgement of claims.
1005.4 Investigation of claims.
1005.5 Disposition of claims.
1005.6 Processing of salvage.
1005.7 Weight as a measure of loss.

AUTHORITY: 24 Stat. 380, 383 as amended, 386; 34 Stat. 595 as amended; 44 Stat. 1450 as amended; 49 Stat. 546 as amended; 550 as amended, 558 as amended, 560 as amended, 561 as amended, 563 as amended; 52 Stat. 1237; 54 Stat. 900, 922, 933, 934 as amended, 935, 944 as amended, 946; 56 Stat. 285, 286, 287, 294 as amended, 295, 297, 746 as amended; 62 Stat. 472; 63 Stat. 486; and 64 Stat. 1114 as amended, 49 U.S.C. 1, 5, 5b, 6, 12, 20, 304, 305, 316, 317, 318, 319, 320, 904, 905, 906, 913, 916, 1003, 1004, 1005, 1009, 1012, 1013 and 1017.

§ 1005.1 Applicability of regulations.

The regulation set forth in this part shall govern the processing of claims for loss, damage, injury, or delay to property transported or accepted for transportation, in interstate or foreign commerce, by each railroad, express company, motor carrier, water carrier, and freight forwarder (hereinafter called carrier), subject to the Interstate Commerce Act.

§ 1005.2 Filing of claims.

(a) *Compliance with regulations.* A claim for loss or damage to baggage or for loss, damage, injury, or delay to

cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or deliverying carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(b) *Minimum filing requirements.* A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and: (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claims for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; provided, however, that where claims are electronically handled, procedures are established to ensure reasonable carrier access to supporting documents.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain

amount, such as "$100 more or less," the carrier against whom such claims is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

(e) *Other claims.* If investigation of a claim develops that one or more other carriers has been presented with a similar claim on the same shipment, the carrier investigating such claim shall communicate with each such other carrier and, prior to any agreement entered into between or among them as to the proper disposition of such claim or claims, shall notify all claimants of the receipt of conflicting or overlapping claims and shall require further substantiation, on the part of each claimant of his title to the property involved or his right with respect to such claim.

§ 1005.3 Acknowledgment of claims.

(a) Each carrier shall, upon receipt in writing or by electronic transmission of a proper claim in the manner and form described in the regulations, acknowledge the receipt of such claim in writing or electronically to the claimant within 30 days after the date of its receipt by the carrier unless the carrier shall have paid or declined such claim in writing or electronically within 30 days of the receipt thereof. The carrier shall indicate in its acknowledgment to the claimant what, if any, additional documentary evidence or other pertinent information may be required by it further to process the claim as its preliminary examination of the claim, as filed, may have revealed.

(b) The carrier shall at the time each claim is received create a separate file and assign thereto a successive claim file number and note that number on all documents filed in support of the claim and all records and correspondence with respect to the claim, including the acknowledgment of receipt. At the time such claim is received the carrier shall cause the date of receipt to be recorded on the face of the claim document, and the date of receipt shall also appear in the carrier's acknowledgment of receipt to the claimant. The carrier shall also cause the claim file number to be noted on the shipping order, if in its possession, and the delivery receipt, if any, covering such shipment, unless the carrier has established an orderly and consistent internal procedure for assuring: (1) That all information contained in shipping orders, delivery receipts, tally sheets, and all other pertinent records made with respect to the transportation of the shipment on which claim is made, is available for examination upon receipt of a claim; (2) that all such records and documents (or true and complete reproductions thereof) are in fact examined in the course of the investigation of the claim (and an appropriate record is made that such examination has in fact taken place); and (3) that such procedures prevent the duplicate or otherwise unlawful payment of claims.

§ 1005.4 Investigation of claims.

(a) *Prompt investigation required.* Each claim filed against a carrier in the manner prescribed herein shall be promptly and thoroughly investigated if investigation has not already been made prior to receipt of the claim.

(b) *Supporting documents.* When a necessary part of an investigation, each claim shall be supported by the original bill of lading, evidence of the freight charges, if any, and either the original invoice, a photographic copy of the original invoice, or an exact copy thereof or any extract made

therefrom, certified by the claimant to be true and correct with respect to the property and value involved in the claim; or certification of prices or values, with trade or other discounts, allowance, or deductions, of any nature whatsoever and the terms thereof, or depreciation reflected thereon; Provided, however, that where property involved in a claim has not been invoiced to the consignee shown on the bill of lading or where an invoice does not show price or value, or where the property involved has been sold, or where the property has been transferred at bookkeeping values only, the carrier shall, before voluntarily paying a claim, require the claimant to establish the destination value in the quantity, shipped, transported, or involved; Provided, further, that when supporting documents are determined to be a necessary part of an investigation, the supporting documents are retained by the carriers for possible Commission inspection.

(c) *Verification of Loss.* When an asserted claim for loss of an entire package or an entire shipment cannot be otherwise authenticated upon investigation, the carrier shall obtain from the consignee of the shipment involved a certified statement in writing that the property for which the claim is filed has not been received from any other source.

§ 1005.5 Disposition of claims.

(a) Each carrier subject to the Interstate Commerce Act which receives a written or electronically transmitted claim for loss or damage to baggage or for loss, damage, injury, or delay to property transported shall pay, decline, or make a firm compromise settlement offer in writing or electronically to the claimant within 120 days after receipt of the claim by the carrier; *Provided, however,* That, if the claim cannot be processed and disposed of within 120 days after the receipt thereof, the carrier shall at that time and at the

expiration of such succeeding 60-day period while the claim remains pending, advise the claimant in writing or electronically of the status of the claim and the reason for the delay in making final disposition thereof and it shall retain a copy of such advice to the claimant in its claim file thereon.

(b) When settling a claim for loss or damage, a common carrier by motor vehicle of household goods as defined in 49 CRF 1056.1(b)(1) shall use the replacement costs of the lost or damaged item as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item: *Provided,* That where an item cannot be replaced or no suitable replacement is obtainable, the proper measure of damages shall be the original costs, augmented by a factor derived from a consumer price index, and adjusted downward by a factor depreciation over average useful life.

§ 1005.6 Processing of salvage.

(a) Whenever baggage or material, goods, or other property transported by a carrier subject to the provisions herein contained is damaged or alleged to be damaged and is, as a consequence thereof, not delivered or is rejected or refused upon tender thereof to the owner, consignee, or person entitled to receive such property, the carrier, after giving due notice, whenever practicable to do so, to the owner and other parties that may have an interest therein, and unless advised to the contrary after giving such notice, shall undertake to sell or dispose of such property directly or by the employment of a competent salvage agent. The carrier shall only dispose of the property in a manner that will fairly and equally protect the best interests of all persons having an interest therein. The carrier shall make an itemized record sufficient to identify the property involved so as to be able to correlate it to the shipment or transportation involved, and claim, if any, filed thereon.

The carrier also shall assign to each lot of such property a successive lot number and note that lot number on its record of shipment and claim, if any claim is filed thereon.

(b) Whenever disposition of salvage material or goods shall be made directly to an agent or employee of a carrier or through a salvage agent or company in which the carrier or one or more of its directors, officers, or managers has any interest, financial or otherwise, that carrier's salvage records shall fully reflect the particulars of each such transaction or relationship, or both, as the case may be.

(c) Upon receipt of a claim on a shipment on which salvage has been processed in the manner hereinabove prescribed, the carrier shall record in its claim file thereon the lot number assigned, the amount of money recovered, if any, from the disposition of such property, and the date of transmittal of such money to the person or persons lawfully entitled to receive the same.

§ 1005.7 Weight as a measure of loss.

Where weight is used as a measure of loss in rail transit of scrap iron and steel and actual tare and gross weights are determined at origin and destination, the settlement of claims shall be based upon comparison of net weights at origin and destination.

Part 1307 — Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers.
Subpart D - Released Rates.

Section 1307.201 Released rates on household goods.

(a) Establishment authorized; rate bases. Subject to the conditions specified in succeeding paragraphs of this section, each motor common carrier authorized to perform the specialized service of a household goods carrier be, and it is hereby, authorized to establish and maintain by filing and posting in the manner required by the Interstate Com-

merce Act, commodity rates for the transportation in interstate or foreign commerce, and charges for accessorial services in connection therewith, of household goods, as defined by the Commission, said rates and charges to be applicable only when the value of the property as declared by the shipper in writing, or agreed upon in writing as the released value thereof is as follows:

Released Values and Liability Limitations	Transportation Rate Basis	Storage in Transit Rate Basis
Released to a value not exceeding 60 cents per pound per article for the actual weight of any article or articles in a shipment.	Base transportation rate.	Base storage rate.
Released to a declared lump sum value for an entire shipment. However, if the value declared is less than $1.25 times the actual weight (in pounds) of the shipment, such declaration will be ineffective and the shipment will be deemed instead to have been released to a declared lump sum value equal to $1.25 times the actual total weight (in pounds) of the shipment.	Base transportation rate plus a valuation charge of 50 cents for each $100, or fraction thereof, of the released value of the entire shipment. On shipments destined to a point in Mexico valuation charge will be $1.50 for each $100, or fraction thereof of the released value of the entire shipment.	110 per cent of the base storage rate for the first 60-day period of storage. Thereafter, 110 percent of the base storage rate for each storage period of 30 days, or fraction thereof.

No rule of coresponsibility may be employed to reduce the liability of the carrier for loss, damage, or delay to the property. The total parts comprising any article knocked down or taken apart for handling or loading shall constitute one article for the purpose of determining the carrier's liability as provided above.

(b) Changes in rates or related valuations. Changes may be made in the rates or charges established under the authority of this order but the released values provided in this section may not be decreased, nor may the value charges as specified in this section be increased without specific authority of the Commission.

(c) Statement on bills of lading. The bill of lading issued for any shipment accepted for transportation and storage at released rates and charges established and maintained under authority of this order, shall have printed in distinctive color in boldface type on the face thereof a statement reading as follows:

Unless the shipper expressly releases the shipment to a value of 60 cents per pound per article, the carrier's maximum liability for loss and damage shall be either the lump sum value declared by the shipper or an amount equal to $1.25 for each pound of weight in the shipment, whichever is greater.

The release of value must be entered in the following form directly below and immediately following the foregoing statement, and must be completed only by the person signing it.

The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper hereby releases the entire shipment to a value not exceeding

_____

(to be completed by the person signing below)

NOTICE: THE SHIPPER SIGNING THIS CONTRACT MUST INSERT IN THE SPACE ABOVE IN HIS OWN HANDWRITING, EITHER HIS DECLARATION OF THE ACTUAL VALUE OF THE SHIPMENT, OR THE WORDS "60 cents per pound per article." OTHERWISE, THE SHIPMENT WILL BE DEEMED RELEASED TO A MAXIMUM VALUE EQUAL TO $1.25 TIMES THE WEIGHT OF THE SHIPMENT IN POUNDS.

_____

(Shipper)

_____

(Date)

Provided that: Where the shipper is the employer of the actual owner of the household goods being transported and is responsible for all transportation charges in connection with such a move, the shipper may instruct the motor carrier to release the shipment to a value of 60 cents per pound per article (a) by specification made on a purchase order, or (b) by issuing, in advance of the shipping date, appropriate letters of instructions to the carrier. In such instances, the motor carrier must incorporate the instructions by reference to the document in (a) or (b) above in the bill of lading in lieu of the personal signature and handwritten statement relating to released rates.

(d) Statement in tariffs. Tariffs containing rates or charges established under authority of this order shall specifically provide the carrier's maximum liability for loss or damage to property shall be the lump sum value declared or an amount equal to $1.25 times the weight of the shipment in pounds, whichever is greater, unless the shipper expressly releases the shipment to a value of 60 cents per pound per article, in which case the carrier's liability shall not exceed that value. Tariffs shall provide that in the event shipper does not declare a lump sum value or release the shipment to a value of 60 cents per pound per article the shipment will be deemed released to a lump sum value equal to $1.25 times the total weight of the shipment (in pounds). No rule of coresponsibility may be employed. Such tariffs shall show the following notation:

> Rates or charges herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order No. _____ of _____ subject to complaint or suspension.

(e) Limitation of authority. This section does not constitute authority for the establishment of released rates

or charges on any description of traffic other than herein specifically indicated, nor on tariff originating in an adjacent foreign country destined to points in the United States.

(f) Lawfulness of rates. The Commission does not hereby approve the lawfulness, except under section 20(11) and 219 of the Interstate Commerce Act, of any rate or charge which may be filed under authority of this section.

APPENDIX L

COMPLAINT FOR DAMAGES FOR BREACH OF WRITTEN CONTRACT, TORTIOUS BAD FAITH, INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS, FRAUD AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND FOR AWARD OF ATTORNEYS' FEES PURSUANT TO 49 U.S.C. § 11711

CASE NO. WEC072311

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JAMES K. T. HUNTER and GINA F. BRANDT,
Plaintiffs,

vs.

UNITED VAN LINES, INC., a Missouri corporation,
TRILCO, INC., a California corporation,
JOHN TRLICA, CROWN TRANSFER & STORAGE,
a California corporation, JOHN FALBE and
DOES 1 through 16, inclusive,
Defendants.

ORIGINAL FILED

Feb. 8, 1982

COUNTY CLERK

FIRST CAUSE OF ACTION

(By Plaintiffs Against Defendant United Van Lines, Inc. For Breach of Written Contract)

1. Plaintiffs James K. T. Hunter ("Hunter") and Gina F. Brandt (aka Gina Brandt Hunter) ("Brandt"), husband and wife, are now, and at all times relevant hereto have been, residents of Los Angeles County, California.

2. John Jukes and Nancy H. Jukes (collectively, the "Jukeses"), husband and wife, are now, and at all times

relevant hereto have been, residents of Los Angeles County, California.

3. Plaintiffs are informed and believe and thereon allege that Defendant United Van Lines, Inc. ("United") is a Missouri corporation which is now, and at all times relevant hereto has been, doing business in Los Angeles County, California in its capacity as a motor common carrier providing transportation of, *inter alia*, household goods subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of Title 49 of the United States Code.

4. Plaintiffs are informed and believe and thereon allege that Defendant Trilco, Inc. ("Trilco") is a California corporation which is now, and at all times relevant hereto has been, doing business in Los Angeles County, California, that Trilco is now, and at all times relevant hereto has been, a furniture restoration firm retained by United to act as an independent contractor for the purpose of estimating the value, and assessing the time of causation, of damage caused to goods carried by United with a final destination point in Los Angeles County, California, that at the time Trilco initially was retained by United, Trilco was made to understand by United, and did in fact understand, that United's continued retention and utilization of Trilco as an independent contractor, which continued retention and utilization by United would be extremely profitable to Trilco, was dependent on Trilco's consistently providing United both with estimates of the value of damage caused to goods carried by United which were substantially below the true market value of that damage and with assessments of the time of causation of damage to goods carried by United which, in the absence of absolutely conclusive evidence that that damage had occurred during United's transportation of the goods in question,

concluded that the damage in question had occurred either before or after United's transportation of such goods, that as a direct and proximate result of the above-described understanding of Trilco, Trilco thereupon entered into a conspiracy (the "Trilco-United conspiracy") with United the purpose of which was wrongfully to decrease the amount recovered by shippers from United as a result of damage to goods occurring during United's transportation thereof and that all of the actions hereinafter alleged to have been taken by Trilco and/or its President John Trlica were taken while Trilco was acting pursuant to United's retention of Trilco and pursuant to, and in furtherance of, the Trilco-United conspiracy.

5. Plaintiffs are informed and believe and thereon allege that Defendant John Trlica ("Trlica") is now, and at all times relevant hereto has been, a resident of Los Angeles County, California, that Trlica is now, and at all times relevant hereto has been, the President of Trilco, that Trlica is now, and at all times since the creation of the Trilco-United conspiracy has been, aware of the existence and purpose of the Trilco-United conspiracy and that all of the actions hereinafter alleged to have been taken by Trlica were taken by Trlica while acting within the scope and authority of his managerial capacity as President of Trilco and with knowledge that such actions were pursuant to, and in furtherance of, the Trilco-United conspiracy.

6. Plaintiffs are informed and believe and thereon allege that Defendant Crown Transfer & Storage ("Crown") is a California corporation, that Crown is now, and at all times relevant hereto has been, employed by United as its agent for the purpose of handling the initial processing of claims made to United in Los Angeles County, California as a result of damage caused to goods carried by United, that all of the actions hereinafter alleged to have been taken by

Crown and/or its employees John Falbe and Peggy Moffett were taken while Crown was acting within the scope and authority of its agency relationship with United and that all of such actions were both authorized by United before the fact and ratified by United after the fact.

7. Plaintiffs are informed and believe and thereon allege that Defendant John Falbe ("Falbe") is now, and at all times relevant hereto has been, a resident of Los Angeles County, California, that Falbe is now, and at all times relevant hereto has been, an employee of Crown, that all of the actions hereinafter alleged to have been taken by Falbe were taken by Falbe while Falbe was acting in a managerial capacity within the scope and authority of his employment by Crown and that all of such actions were both authorized by Crown before the fact and ratified by Crown after the fact.

8. Plaintiffs are informed and believe and thereon allege that Peggy Moffett ("Moffett") is now, and at all times relevant hereto has been, an employee of Crown, that all of the actions hereinafter alleged to have been taken by Moffett were taken by Moffett while Moffett was acting in a managerial capacity within the scope and authority of her employment by Crown and that all such actions were both authorized by Crown before the fact and ratified by Crown after the fact.

9. Plaintiffs are informed and believe and thereon allege that both Michael P. Dulle ("Dulle") and Kathy Moore ("Moore") are now, and at all times relevant hereto have been, employees of United, that all of the actions hereinafter alleged to have been taken by Dulle and Moore were taken by Dulle and Moore while Dulle and Moore were acting in a managerial capacity within the scope and authority of their employment by United and that all of such actions were both authorized by United before the fact and ratified by United after the fact.

10. Plaintiffs are informed and believe and thereon allege that L.A. Lewis, Inc. ("Lewis, Inc.") is a Pennsylvania corporation, that Lewis, Inc. is now, and at all times relevant hereto has been, employed by United as its agent for the purpose of handling the initial processing of requests made to United for the carriage of goods from an original loading address located in Monroe County, Pennsylvania, that all of the actions hereinafter alleged to have been taken by Lewis, Inc. and/or its employee Diane Lewis were taken while Lewis, Inc. was acting within the scope and authority of its agency relationship with United and that all of such actions were both authorized by United before the fact and ratified by United after the fact.

11. Plaintiffs are informed and believe and thereon allege that Diane Lewis ("Lewis") is now, and at all times relevant hereto has been, an employee of Lewis, Inc., that all of the actions hereinafter alleged to have been taken by Lewis were taken by Lewis while Lewis was acting in a managerial capacity within the scope and authority of her employment by Lewis, Inc. and that all of such actions were both authorized by Lewis, Inc. before the fact and ratified by Lewis, Inc. after the fact.

12. Plaintiffs are informed and believe and thereon allege that those individuals who are designated herein by fictitious names as Driver 1 and Driver 2 are now, and at all times relevant hereto have been, employees of United, that all of the actions hereinafter alleged to have been taken by Driver 1 and Driver 2 were taken by Driver 1 and Driver 2 while Driver 1 and Driver 2 were acting within the scope and authority of their employment by United and that all of such actions were both authorized by United before the fact and ratified by United after the fact.

13. Plaintiffs do not know the true names and capacities of Defendants Does 1 through 16, inclusive, and will ask

leave to allege their true names and capacities when they have been ascertained.

14. Plaintiffs are informed and believe and thereon allege that at all times mentioned there was such a unity of interest and ownership between Trilco and Defendant Does 1 through 3, and each of them, and Trilco was so dominated, influenced and controlled by Defendants Does 1 through 3, and each of them, that the individuality and separateness of Trilco has ceased and that Trilco constitutes an alter ego of Defendants Does 1 through 3, and each of them. Under the circumstances as alleged herein, adherence to the fiction of Trilco's separate corporate existence would sanction a fraud and promote injustice.

15. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein there was such a unity of interest and ownership between Crown and Defendants Does 4 through 6, and each of them, and Crown was so dominated, influenced and controlled by Defendants Does 4 through 6, and each of them, that the individuality and separateness of Crown has ceased and that Crown constitutes an alter ego of Defendants Does 4 through 6, and each of them. Under the circumstances as alleged herein, adherence to the fiction of Crown's separate corporate existence would sanction a fraud and promote injustice.

16. Plaintiffs are informed and believe and thereon allege that Does 7 through 16, and each of them, participated in concert and in conspiracy with the named Defendants in the commission of each and all of the wrongful acts hereinafter alleged with knowledge that said acts were and are in violation of the rights of Plaintiffs as hereinafter set forth. Plaintiffs are informed and believe and thereon allege that Defendants Does 7 through 16, and each of them, were at all times relevant herein, and now are, the agents

of the named Defendants, and of each other, and that in doing the things herein alleged, Defendants Does 7 through 16, and each of them, were acting within the course and scope of such agency relationship and in furtherance of the conspiracy hereinabove alleged.

17. On or about August 1, 1981, Nancy H. Jukes, acting both on her own behalf and as the agent of John Jukes, entered into a written contract (the "Contract") with United pursuant to which United agreed to transport an automobile owned by Nancy H. Jukes and various household goods owned by the Jukeses and Plaintiffs (collectively, the "Property") from Henryville, Pennsylvania to Los Angeles, California. A true and correct copy of the Contract is attached as Exhibit "1" hereto.

18. To the extent that the Contract provided for the transportation of Plaintiffs' household goods, the Contract was made expressly for the benefit of Plaintiffs; and, in addition, on or about January 14, 1982, the Jukeses' assigned to Plaintiffs all rights, claims and interests possessed by the Jukeses against Defendants as a result of, and in connection with, the transportation of the Property from Pennsylvania to California.

19. Under the terms of the Contract, and pursuant to 49 U.S.C. § 11707, United assumed liability for actual loss or injury to the Property caused by United during the transportation of the Property by United up to a maximum liability of $50,000.00.

20. The Jukeses duly performed all the conditions and covenants to be satisfied and performed by them under and pursuant to the Contract.

21. During the transportation of the Property by United, which transportation was completed on August 12, 1981,

United caused extensive actual loss and injury to the Property; and, in particular, United caused injury to:

a. various household goods owned by the Jukeses ("the Jukeses' damaged household goods");

b. an antique drop leaf table owned by Hunter ("the Table"); and

c. various additional pieces of antique furniture owned by Plaintiffs ("Plaintiffs' additional damaged antiques").

22. United has breached its obligations to Plaintiffs under the Contract and 49 U.S.C. § 11707 in that United has offered Plaintiffs $585.50 in full settlement of all claims for damage to the Jukeses' damaged household goods, the Table and Plaintiffs' additional damaged antiques, despite the fact that the actual value of that damage is in excess of $2,500.00.

23. As a result of the above-described breach by United of its obligations under the Contract, Plaintiffs have been damaged in an amount whose full extent has not yet been ascertained, but which is in excess of $2,500.00.

SECOND CAUSE OF ACTION

(By Plaintiffs Against Defendants United Van Lines, Inc., Trilco, Inc., John Trlica, Does 1 Through 3 And Does 7 Through 16 For Tortious Bad Faith)

24. Plaintiffs reallege and incorporate by this reference all of the allegations of paragraphs 1 through 22 hereof.

25. Prior to August 1, 1981, Brandt, acting as agent of the Jukeses, stated to Lewis that the Jukeses wished to obtain insurance in the amount of $50,000.00 against the risk of damage to the Property during its transportation by United; and Lewis, who purported to have superior knowledge as to how such insurance could be obtained,

represented to Brandt (the "insurance representation") that the Jukeses could obtain such insurance from United by payment of an additional valuation charge in the amount of $250.00 and that the purchase of the insurance would be noted on the Bill of Lading by the insertion of the desired amount of insurance coverage in the space reserved for the shipper's statement of the released value of the shipment.

26. In reliance on the insurance representation, the Jukeses agreed to pay, and did pay, an additional valuation charge of $250.00.

27. The Contract, which consists of a pre-printed standardized Bill of Lading drafted by United, was presented to to Jukeses on a take it or leave it basis.

28. By operation of law there is implied in the Contract a covenant of good faith and fair dealing which, under the circumstances, imposed upon United an obligation fairly to consider, evaluate and pay legitimate claims under the Contract.

29. United, Trilco and Trlica breached the implied covenant of good faith and fair dealing in considering, evaluating and paying the claims made by the Jukeses and Plaintiffs as to the Jukeses' damaged household goods, the Table and Plaintiffs' additional damaged antiques in that:

a. immediately upon the delivery of the Property at the Jukeses' residence on August 12, 1981, Driver 1 and Driver 2, who were driving the United truck containing the Property at the time of that delivery, failed to advise Plaintiffs, whom Driver 1 and Driver 2 knew were engaged in transporting various items which had been damaged during the transportation of the Property to Plaintiffs' residence located two blocks to the south of the Jukeses' residence, that it was United's regular custom and practice either totally to deny, or at least greatly to discount, claims

made by shippers with respect to items removed from the place of delivery prior to United's inspection of those items, despite the fact that Plaintiffs are further informed and believe and thereon allege that Driver 1 and Driver 2 were aware of such custom and practice;

b. upon the completion of the unloading of the Property from the United truck at the Jukeses' residence on August 12, 1981, Driver 1 (i) stated that, due to the lateness in the day and the size of the delivery, it was neither necessary nor sensible to inspect and unpack all of the Property for the purpose of determining all damage to the Property so that Driver 1 could execute the Household Goods Descriptive Inventory ("Inventory") in acknowledgement of all of the exceptions by Plaintiffs and the Jukeses to the condition of the Property, (ii) further stated that it would sufficiently preserve all of the Jukeses' and Plaintiffs' rights to recover for the damages to the Property if Driver 1 wrote on the Contract that the Property was "To be inspected and unpacked at a later date" and then initialled that statement and (iii) having induced Nancy H. Jukes to agree to the foregoing procedure, added the suggested statement to the Contract and initialled it, despite the fact that Plaintiffs are informed and believe and thereon allege that Driver 1 was aware that the absence of the signature of Driver 1 on the Inventory acknowledging Plaintiffs' exceptions to the condition of the Table and Plaintiffs' additional damaged antiques would be relied upon by United as an additional reason supporting United's denial of Plaintiffs' claims for damage to those items;

c. upon being advised by Brandt by telephone on August 12, 1981 that substantial damage had been

done to the Property, including several fine antiques, during shipment, Moffett immediately sent Nancy H. Jukes a letter dated August 12, 1981 (a true and correct copy of which letter is attached as Exhibit "2" hereto) wherein Moffett attempted to dissuade the Jukeses and Plaintiffs from themselves obtaining any estimates on the cost of any repairs for the damaged furniture by stating that such estimates were not "necessary . . . as United uses top grade, fully qualified and experienced furniture restoration firms", despite the facts that Plaintiffs are informed and believe and thereon allege that, as Moffett was well aware, (i) United utilizes furniture restoration firms for two distinct purposes, which are (a) to act as an independent contractor for the purpose of estimating the value, and assessing the time of causation, of damages caused to goods carried by United and/or (b) to act as an independent contractor for the purpose of repairing damage caused to goods carried by United, (ii) the selection of furniture restoration firms for the former purpose is dependent upon such firms' agreement to, and entry into, a conspiracy with United of the nature of the Trilco-United conspiracy, (iii) the principal criterion used by United in selecting furniture restoration firms for the latter purpose is the prices charged by such firms to United for furniture restoration, not the quality of the furniture restoration performed by such firms, (iv) as a result of United's reliance on price as the principal criterion in selecting furniture restoration firms for the latter purpose, the furniture restoration firms selected by United are generally not as top grade, fully qualified or experienced as other, more costly furniture restoration firms not selected by United due to their higher prices, (v) that as a further result of United's reliance

on price as the principal criterion in selecting furniture restoration firms for the latter purpose, the furniture restoration firms selected by United are generally not specialists, or fully qualified or experienced, in the restoration of fine antiques, but rather the restoration or contemporary, non-antique furniture, (vi) as a result of all of the foregoing, the true purpose and motivation of United in seeking to dissuade Plaintiffs and the Jukeses from themselves obtaining repair estimates regarding the damaged property was to deter Plaintiffs and the Jukeses from discovering (a) the true retail cost of having the damaged property repaired by a top grade, fully qualified and experienced furniture restoration firm (so that Plaintiffs and the Jukeses might be mislead by their ignorance of the true retail cost into accepting in settlement of their claims the below-market repair estimates which would be provided by United's furniture restoration firm) and (b) the quality of the restorations provided by top grade, fully experienced and qualified furniture restoration firms (so that Plaintiffs and the Jukeses might be mislead by their ignorance of the quality of restoration work available from such firms into accepting in settlement of their claims the inferior quality of restoration which would be provided by United's furniture restoration firms);

d. in a telephone conversation on or about August 21, 1981, Falbe, in an attempt to mislead and intimidate Plaintiffs into abandoning their claims for damages to the Table and Plaintiffs' additional damaged antiques, wrongly asserted to Nancy H. Jukes that no claim could be made by Plaintiffs with respect to any property moved by Plaintiffs from the Jukeses' residence prior to United's having been afforded a chance to inspect that property;

e. on or about August 28, 1981, Falbe sent Brandt a letter, a true and correct copy of which is attached as Exhibit "4" hereto, in response to a prior letter of Brandt to Falbe dated August 23, 1981, a true and correct copy of which letter is attached as Exhibit "3" hereto, wherein Falbe (i) falsely denied that he had stated to Brandt during a telephone conversation on August 22, 1981 ,that each claim made by Plaintiffs and the Jukeses would be individually evaluated and that there was no regulation or contractual provision which states that the removal of an item damaged in the move by United from the original place of destination precludes recovery for that damage and (ii) wrongly asserted that "the carrier must be given the opportunity to inspect any claimed damage prior to its removal" in an attempt to mislead and intimidate Plaintiffs into abandoning their claims for damages to the Table and Plaintiffs' additional damaged antiques;

f. upon Falbe's receipt of the Claims Forms and copies of the Freight Bill and Inventory with respect to the damage done by United to the Property, which receipt Plaintiffs are informed and believe and thereon allege occurred on or before September 28, 1981, Falbe designated Trilco to inspect the items of the claims made by the Jukeses and Plaintiffs on behalf of United, despite the fact that Plaintiffs are informed and believe and thereon allege that Falbe was aware that Trilco's inspection of those items would be performed by Trilco in accordance with, and pursuant to, the Trilco-United conspiracy;

g. upon Trilco's designation to inspect the items of the claims made by the Jukeses and Plaintiffs, Plaintiffs are informed and believe and thereon allege that Trlica (i) conducted only a superficial investigation as to whether the Table and Plaintiff's additional dam-

aged antiques had been damaged during United's transportation of those items, which superficial investigation was carefully confined and restricted in its scope with the express intent and purpose of not revealing or discovering any facts which would contradict Trlica's preconceived conclusion that the damage to those items had occurred after the delivery of those items to the Jukeses' residence and (ii) upon the conclusion of that superficial investigation, filed a report (the "Trilco report") with United in or before December of 1981 which wrongfully and in bad faith (a) failed to disclose that certain of the injuries caused to Plaintiffs' additional damaged antiques (and in particular to an antique baby crib included therein) could only plausibly have resulted from extreme pressure of the type which was known by Trlica to have occurred during the transportation of the Property by United and which could not plausibly have occurred during Plaintiffs' movement of Plaintiffs' additional damaged antiques from the Jukeses' residence to Plaintiffs' residence, (b) concluded that the damage to the Table and Plaintiffs' additional damaged antiques had occurred after the delivery of those items to the Jukeses' residence despite the fact that Trlica had discovered no evidence whatsoever which supported that conclusion and (c) deliberately provided estimates for the cost of repair of the various damaged items which were below the true retail cost of having those items repaired;

h. upon United's receipt of the Trilco report, Plaintiffs are informed and believe and thereon allege that Dulle in bad faith and with knowledge that his actions were in violation of Plaintiffs' and the Jukeses' rights (i) accepted and treated the Trilco report as complete and accurate despite Dulle's knowledge of the facts

(a) that Trilco had conducted only a superficial investigation of the facts, (b) that Trilco had discovered, and relied upon, no evidence whatsoever in support of its conclusion that the damage to the Table and Plaintiffs' additional damaged antiques had occurred after the delivery of those items to the Jukeses' residence and (c) that Trilco's estimates for the cost of repair of the various damaged items in all likelihood were below the true retail cost of having these items repaired, (ii) either totally failed to contact Driver 1 or Driver 2 in order to verify if the Table or Plaintiffs' additional damaged antiques were delivered in a damaged condition or made only a cursory contact with Driver 1 during which contact Dulle made no attempt whatsoever actually to verify the existence of the damages claimed by Plaintiffs, despite the fact that Dulle was aware that Falbe in a letter dated September 8, 1981, a true and correct copy of which letter is attached as Exhibit "5," hereto, had expressly represented to Brandt that "the driver will be contacted for verification of the damage and/or loss claimed", (iii) on or about December 21, 1981 sent Brandt a letter, a true and correct copy of which is attached as Exhibit "6" hereto, wherein Dulle (a) refused to pay for the damages to the Table and Plaintiffs' additional damaged items, (b) offered an inadequate amount in settlement of the claims for the Jukeses' damaged household goods based on the recommendations of the Trilco report and (c) conditioned the acceptance of the settlement offered with respect to the Jukeses' damaged household goods on Plaintiffs' and the Jukeses' abandonment of any claims with respect to the Table and Plaintiffs' additional damaged antiques;

i. in a telephone conversation on or about December 24, 1981 (the "December 24 conversation"), Dulle (i)

stated to Brandt that Dulle had personally contacted Driver 1 who had indicated to Dulle that neither the Table nor Plaintiffs' additional damaged antiques were damaged at the time of the delivery of those items at the Jukeses' residence, despite the fact that Plaintiffs are informed and believe and thereon allege that Dulle either had totally failed to contact Driver 1 or had had only a cursory contact wherein Dulle had made no attempt whatsoever actually to verify the existence of the damages claimed by Plaintiffs, (ii) refused a request by Brandt that she be sent a copy of the Trilco report on the grounds that that report was the personal property of United and (iii) informed Brandt that she should not cash the check enclosed with Dulle's letter dated December 21, 1981, which check was based on the recommendations of the Trilco report with respect to the Jukeses' damaged household goods, despite the fact that Brandt stated to Dulle that the Jukeses were willing and desirous of accepting that check in full and complete settlement of all of the Jukeses' claims with respect to the Jukeses' damaged household goods;

j. after the completion of the December 24 conversation, and solely because Brandt's vehemence during the December 24 conversation had convinced Dulle that Plaintiffs might file a lawsuit if United persisted in its total intransigence with respect to Plaintiffs' claims of damages to the Table and Plaintiffs' additional damaged antiques, Dulle (i) had a conversation with Driver 1 wherein Dulle substantiated Plaintiffs' claims of damage to the Table but made no good faith attempt whatsoever actually to verify the existence of the damages claimed by Plaintiffs with respect to Plaintiffs' additional damaged antiques and (ii) on or about January 13, 1982 sent Brandt a letter, a true and

correct copy of which is attached as Exhibit "7" hereto, wherein Dulle (a) offered Plaintiffs one half of the inadequate cost of repair of the Table which had been estimated by Trilco, (b) refused to pay for the damages to Plaintiffs' additional damaged antiques and (3) enclosed a check in the amount of one half of the cost of repair of the Table estimated by Trilco which included language on the back thereof that endorsement of that check would constitute a full release of all claims pertaining to United's transportation of the Property; and

k. in a telephone conversation on or about January 19, 1982, Moore (i) informed Brandt that she could not cash the check enclosed with Dulle's letter dated December 21, 1981 unless Plaintiffs and the Jukeses were willing to release all claims relating to United's transportation of the Property, despite the fact that Brandt stated to Moore that the Jukeses were willing and desirous of accepting that check in full and complete settlement of all of the Jukeses' claims with respect to the Jukeses' damaged household goods and (ii) stated to Brandt that Plaintiffs' claims had been reviewed by United on several occasions and that no further settlement offer would be forthcoming.

30. As a direct, proximate result of the above-described breaches by United, Trilco and Trlica of the implied covenant of good faith and fair dealing, Plaintiffs have suffered the following actual damages:

a. Plaintiffs have been damaged in the amount whose full extent has not yet been ascertained, but which is in excess of $2,500.00, representing the amount that Plaintiffs were entitled to receive as compensation for the damage to the Jukeses' damaged household goods, the Table and Plaintiffs' additional damaged antiques;

b. Plaintiffs have been damaged in the amount of $50,000.00, representing the emotional distress caused by Plaintiffs due to such above-described breaches and, in particular, the emotional distress caused to Brandt, who, as Lewis was aware, on August 1, 1981 both (i) was six months pregnant with Plaintiffs' first child, Cia Holbrook Hunter, and (ii) was extremely anxious to insure that one of Plaintiffs' additional damaged antiques, an antique brass baby crib newly purchased by Plaintiffs in perfect condition, would arrive in Los Angeles without injury; and

c. Plaintiffs have been damaged, and will continue to be damaged in an amount currently in excess of $3,000.00, representing the reasonable value of attorneys' fees which Plaintiffs have been required to incur in order to obtain payment from United of the amount that Plaintiffs were and are entitled to receive as compensation for the damage to the Jukeses' household goods, the Table and Plaintiffs' additional damaged antiques.

31. Plaintiffs are informed and believe and thereon allege that in committing the above-described breaches of the implied covenant of good faith and fair dealing, United, Triclo and Trlica were guilty of oppression, fraud and malice in that United, Triclo and Trlica intended their actions to cause injury to Plaintiffs and the Jukeses, engaged in such actions with a conscious disregard of the rights of Plaintiffs and the Jukeses, subjected Plaintiffs and the Jukeses to cruel and unjust hardship in conscious disregard of the rights of Plaintiffs and the Jukeses, and, as is specified in paragraph 29 hereof, engaged in numerous intentional misrepresentations, deceits and concealments of material facts known to United, Trilco and Trlica with the intention of thereby depriving Plaintiffs and the

Jukeses of their legal rights to recover for the damage to the Jukeses' damaged household goods, the Table and Plaintiffs' additional damaged antiques; and Plaintiffs therefore are entitled to an award of punitive damages against United, Trilco and Trlica in the amounts of $5,000,000.00, $200,000.00 and $50,000.00, respectively.

THIRD CAUSE OF ACTION

(By Plaintiffs Against Defendants United Van Lines, Inc., Trilco, Inc., John Trlica, Does 1 Through 3 And Does 7 Through 16 For Intentional Interference With Contractual Relations)

32. Plaintiffs reallege and incorporate by this reference all of the allegations of paragraphs 1 through 22 and 25 through 31 (excluding subparagraph c of paragraph 30) hereof.

33. Plaintiffs are informed and believe and thereon allege that at the time Trlica engaged in the actions described in subparagraph g of paragraph 29 hereof, Trlica had knowledge of the existence of the Contract and engaged in such actions with the knowledge and intention that the direct, proximate result of such actions would be to induce United to breach the Contract as alleged in paragraph 22 hereof.

34. Plaintiffs are informed and believe and thereon allege that if Trlica had not engaged in the actions described in subparagraph g of paragraph 29 hereof, United would not have breached the Contract as alleged in paragraph 22 hereof.

FOURTH CAUSE OF ACTION

(By Plaintiffs Against Defendants United Van Lines, Inc. And Does 7 Through 16 For Fraud)

35. Plaintiffs reallege and incorporate by this reference all of the allegations of paragraphs 1 through 22 and 25 through 29 hereof.

36. Plaintiffs are informed and believe and thereon allege that at the time the insurance representation was made by Lewis to Brandt, the insurance representation was false, and was known by Lewis to be false, in that insurance could not be, and in fact was not, obtained by the Jukeses from United as a result of the Jukeses' payment of an additional valuation charge in the amount of $250.00.

37. Plaintiffs are informed and believe and thereon allege that Lewis made the insurance representation to Brandt with the intention of inducing the Jukeses to agree to pay an additional valuation charge of $250.00.

38. If Brandt had been advised by Lewis that insurance would not be obtained from United as a result of the Jukeses' payment of an additional valuation charge, the Jukeses would not have paid United an additional valuation charge of $250.00 but instead would have obtained insurance in the amount of $50,000.00 against the risk of damage to the Property during its transportation by United from a duly qualified insurer.

39. Plaintiffs are informed and believe and thereon allege that if the Jukeses had obtained insurance in the amount of $50,000.00 against the risk of damage to the Property during its transportation by United from a duly qualified insurer, that insurer would not have been guilty of conduct similar to the breaches of the implied covenant of good faith and fair dealing described in paragraph 29 hereof and that, to the contrary, the insurer would promptly

have paid the Jukeses and Plaintiffs for the full amount of the damages caused to the Jukeses' damaged household goods, the Table and Plaintiffs' additional damaged antiques.

40. As a direct, proximate result of the above-described fraud, Plaintiffs have suffered the following actual damages:

a. Plaintiffs have been damaged in the amount whose full extent has not yet been ascertained, but which is in excess of $2,500.00, representing the amount that Plaintiffs were entitled to receive as compensation for the damage to the Jukeses' damaged household goods, the Table and Plaintiffs' additional damaged antiques; and

b. Plaintiffs have been damaged in the amount of $50,000.00, representing the emotional distress caused Plaintiffs due to such above-described breaches by United, Trilco and Trlica of the implied covenant of good faith and fair dealing and, in particular, the emotional distress caused to Brandt, who, as Lewis was aware, on August 1, 1981 both (i) was six months pregnant with Plaintiffs' first child, Cia Holbrook Hunter, and (ii) was extremely anxious to insure that one of Plaintiffs' additional damaged antiques, an antique brass baby crib newly purchased by Plaintiffs in perfect condition, would arrive in Los Angeles without injury.

41. Plaintiffs are informed and believe and thereon allege that in committing the above-described fraud, United was guilty of oppression, fraud and malice in that United intended its fraud to cause injury to Plaintiffs and the Jukeses, engaged in such fraud with a conscious disregard of the rights of Plaintiffs and the Jukeses, subjected Plaintiffs and the Jukeses to cruel and unjust hardship in con-

scious disregard of the rights of Plaintiffs and the Jukeses, and engaged in such fraud with the intention of thereby depriving Plaintiffs and the Jukeses of the $250.00 paid by the Jukeses as a valuation charge; and Plaintiffs therefore are entitled to an award of punitive damages against United in the amount of $5,000,000.00.

FIFTH CAUSE OF ACTION

(By Plaintiffs Against All Defendants For Intentional Infliction of Emotional Distress)

42. Plaintiffs reallege and incorporate by this reference all of the allegations of paragraphs 1 through 22, 28 and 29 hereof.

43. Plaintiffs are informed and believe and thereon allege that at the time Falbe, Trlica, Dulle and Moore took the actions described in subparagraphs d through k of paragraph 29 hereof, Falbe, Trlica, Dulle and Moore were each participating in a conspiracy with United the purpose of which was to induce Plaintiffs to abandon, or severly compromise, their claims with respect to the Table and Plaintiffs' additional damaged antiques by inflicting so much anguish, embarrassment, humiliation, anxiety, anger, chagrin, disappointment and worry upon Plaintiffs that Plaintiffs would decide that it would be better to accept one or the other of United's unjust settlement offers rather than further to pursue such claims; and each of such actions in fact was taken in accordance with, and in furtherance of, that conspiracy and with the intention and knowledge that such actions would cause Plaintiffs to suffer anguish, embarrassment, humiliation, anxiety, anger, chagrin, disappointment and worry.

44. The actions of Falbe, Trlica, Dulle and Moore as described in subparagraphs d through k of paragraph 29 hereof were outrageous in that:

a. such actions constituted an abuse of the power which Falbe, Trlica, Dulle and Moore possessed over Plaintiffs as a result of Plaintiffs' position as claimants attempting to recover from United for the damages caused the Table and Plaintiffs' additional damaged antiques;

b. Falbe, Trlica, Dulle and Moore knew, or should have known, that the Table and certain of Plaintiffs' additional damaged antiques were family heirlooms;

c. Falbe, Trlica, Dulle and Moore knew, or should have known, that Plaintiffs were about to have, or, with respect to those actions after November 2, 1981, had recently had, a new child whom Plaintiffs had intended to have sleep in an antique brass baby crib which had been recently purchased by Plaintiffs, which baby crib was included among Plaintiffs' additional damaged antiques;

d. Falbe, Trlica, Dulle and Moore knew, or should have known, that Brandt had been chosen to handle the making of the claims with respect to the Jukeses' damaged household goods as well as the Table and Plaintiffs' additional damaged antiques so that United's acceptance of the claims with respect to the Jukeses' damaged household goods while simultaneously declining the claims with respect to all or substantially all of the Table and Plaintiffs' additional damaged antiques placed Brandt in an extremely embarrassing position vis-a-vis the Jukeses since Brandt had to insist that the Jukeses not accept United's offer as to the Jukeses damaged household goods in light of United conditioning such acceptance on the abandon-

ment of Plaintiffs' claims to the Table and Plaintiffs' additional damaged antiques; and

e. Plaintiffs are informed and believe and thereon allege that Falbe, Trlica, Dulle and Moore in fact were relying on all of the facts set forth in subparagraphs a through d of this paragraph to intensify the emotional distress that they were intentionally inflicting on Plaintiffs in the hope and expectation that as a result thereof Plaintiffs would be induced to accept one or the other of United unjust settlement offers.

45. As a direct, proximate result of the outrageous conduct of Falbe, Trlica, Dulle and Moore described in subparagraphs d through k of paragraph 29, Plaintiffs have suffered severe emotional sufferings in the form of intense anguish, embarrassment, humiliation anxiety, anger, chagrin, disappointment and worry, all to Plaintiffs' damage in the amount of $50,000.00.

46. Plaintiffs are informed and believe and thereon allege that in committing the actions described in subparagraphs d through k of paragraph 29, Falbe, Trlica, Dulle and Moore were guilty of oppression, fraud and malice in that Falbe, Trlica, Dulle and Moore intended their actions to cause injury to Plaintiffs and the Jukeses, engaged in such actions with a conscious disregard of the rights of Plaintiffs and the Jukeses, subjected Plaintiffs and the Jukeses to cruel and unjust hardship in conscious disregard of the rights of Plaintiffs and the Jukeses and engaged in numerous intentional misrepresentations, deceits and concealments of material facts known to Falbe, Trlica, Dulle and Moore with the intention of thereby depriving Plaintiffs and the Jukeses of their legal rights to recover for the damage to the Jukeses' damaged household goods, the Table and Plaintiffs' additional damaged antiques; and Plaintiffs therefore are entitled to an award of punitive

damages against United in the amount of $5,000,000.00, against Trilco and Crown in the amount of $200,000.00 each, and against Falbe and Trlica in the amount of $50,000.00 each.

SIXTH CAUSE OF ACTION

(By Plaintiffs Against Defendant United Van Lines, Inc. For Attorneys' Fees Pursuant to 49 U.S.C. § 11711)

47. Plaintiffs reallege and incorporate by this reference all of the allegations of paragraphs 1 through 46 hereof.

48. On or about September 20, 1981, Plaintiffs and the Jukeses jointly submitted claims ("said claims") to United with respect to the damage done to the Jukeses' damaged household goods, the Table and Plaintiffs' additional damaged antiques.

49. Plaintiffs are informed and believe and thereon allege that no dispute settlement program approved under 49 U.S.C. § 11711 was available for use by Plaintiffs and the Jukeses to resolve the dispute between Plaintiffs, the Jukeses and United regarding said claims and Plaintiffs therefore are entitled to an award of reasonable attorneys' fees pursuant to 49 U.S.C. § 11711(d) in the event Plaintiffs prevail in this action.

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

ON THE FIRST CAUSE OF ACTION

1. For an award of Plaintiffs' actual damages, according to proof, in an amount in excess of $2,500.00, with interest thereon as allowed by law;

ON THE SECOND CAUSE OF ACTION

2. For an award of Plaintiffs' actual damages, according to proof, in an amount in excess of $55,500.00, with interest thereon as allowed by law;

3. For awards of punitive damages against United, Trilco and Trlica in the amounts of $5,000,000.00, $200,000.00 and $50,000.00, respectively;

ON THE THIRD CAUSE OF ACTION

4. For an award of Plaintiffs' actual damages, according to proof, in an amount in excess of $52,500.00, with interest thereon as allowed by law;

5. For awards of punitive damages against United, Trilco and Trlica in the amounts of $5,000,000.00, $200,000.00 and $50,000.00, respectively;

ON THE FOURTH CAUSE OF ACTION

6. For an award of Plaintiffs' actual damages, according to proof, in an amount in excess of $52,500.00, with interest thereon as allowed by law;

7. For an award of punitive damages against United in the amount of $5,000,000.00;

ON THE FIFTH CAUSE OF ACTION

8. For an award of Plaintiffs' actual damages in the amount of $50,000.00;

9. For awards of punitive damages against United, Trilco, Crown, Falbe and Trlica in the amounts of $5,000,000.00, $200,000.00, $200,000.00, $50,000.00 and $50,000.00, respectively;

ON THE SIXTH CAUSE OF ACTION

10. For an award of Plaintiffs' reasonable attorneys' fees incurred in connection with this action;

ON ALL CAUSES OF ACTION

11. For Plaintiffs' costs of suit incurred herein; and

12. For such other and further relief as the Court deems proper.

DATED: February 6, 1982

HILL WYNNE TROOP & MEISINGER

By JAMES K. T. HUNTER

Attorneys for Plaintiffs

EXHIBIT "1"

UNIFORM HOUSEHOLD GOODS BILL OF LADING AND WEIGHT

I.C.C. No. 67234

Shipper: Andrew Hunter, Origin: Henryville (45) Monroe, Pa. Address: Hunter Farm Rd. . . . Consignee: Mr. & Mrs. John Jukes, 9111 24th Street West, Los Angeles (19), Calif., in case of delay (213) 559-7623, Order Number 655-183-81. Shipper hereby releases the entire shipment to a value not exceeding $50,000. United Van Lines, Inc. and the above named shipper agree that United Van Lines, the carrier, shall transport the goods and effects tendered by the shipper — subject to the preceding. Signed Nancy Jukes, 8/1/81.

BALANCE OF EXHIBIT "1" ILLEGIBLE

EXHIBIT "2"

Crown Transfer & Storage
Post Office Box 1504
Arcadia, CA 91006
(213) 357-6028

August 12, 1981

Mr. A. Hunter
9111 W. 24th St.
Los Angeles, Ca. 90034

Re. Order Number
655-103-81

Dear Mr. Hunter:

We have been informed that you reported a loss/damage on your shipment. We are very sorry if any loss or damage did occur and will do our best to bring about a satisfactory settlement in line with our legal liability.

We are enclosing a set of United Van Lines' claim forms for you to complete. Please return them in the envelope provided, retaining one copy for your file. This must be accomplished before settlement can be made. It will not be necessary to obtain estimates on the cost of any repairs except for appliances, vehicles, boats, etc., as United uses top grade, fully qualified and experienced furniture restoration firms. Do not discard any damage items until your claim has been finalized.

Thank you very much for allowing United Van Lines, Inc. to be of service. If you have any questions, please do not hesitate to call.

Mr. Falbe will be in further contact with you concerning your claim after he receives the completed claim forms from you.

Please complete the enclosed claim form and along with copies of your bill of lading and inventories return to Mr. Falbe.

Very truly yours,

(signature illegible)
Crown Transfer & Storage
Agent for United Van Lines, Inc.

Enclosures

cc. John Falbe
Customer Service Representative
P.O. Box 1550
San Pedro, California 90733

Serving Southern California Since 1909

EXHIBIT "3"

August 23, 1981

Mr. John Falbe
Crown Transfer and Storage
P.O. Box 1504
Arcadia, California 91006

Re: Subject 655-103-81/Hunter-Jukes

Dear Mr. Falbe:

This letter is to confirm our telephone conversation on Saturday morning, August 22, 1981. In that conversation, you stated that it would not be necessary to file claim forms for each of the items that were damaged but that an attachment to the initial claim form listing the item damaged, the inventory number and other pertinent data would be sufficient.

You further stated that each claim would be individually evaluated and confirmed that there was no regulation or contractual provision which states that the removal of an item damaged in the move by your company from the original place of destination precludes recovery for that damage.

Lastly, you confirmed that no deadline has been missed by not having submitted the claim form prior to this date. You stated that the only deadline was some nine months from the date the move was completed.

As I told you in our conversation, the move was quite a disaster. I cetrainly agree with your assessment that the disastrous state of the move is obvious given the damage to the car. We will work as quickly as possible to complete the claim form and submit it to you. It will, however, take some time to do this. In the future, please address all correspondence and telephone communications relating to this move to me. My home address and telephone number are 9111

Beverlywood Street, Los Angeles, California 90034 — (213) 204-2635. If you are not able to reach me, please call my husband, James Hunter, at his office. His telephone number is (213) 553-6901.

Thank you for your courtesy and cooperation in this matter.

Sincerely,

Gina F. Brandt

GFB:me
cc: Nancy Hunter Jukes

EXHIBIT "4"

Crown Transfer & Storage
Post Office Box 1504
Arcadia, CA 91006
(213) 357-6028

655-103-81
Hunter-Jukes
August 28, 1981

Mrs. James Hunter
9111 Beverlywood Street
Los Angeles, California 90034

Dear Mrs. Hunter:

Thank you for your letter of August 23, 1981.

Apparently there has been some misunderstanding on your part concerning our telecon.

The first paragraph of your letter is correct.

In regard to the second paragraph, the carrier must be given the opportunity to inspect any claimed damage prior to its removal.

Regarding the third paragraph, the time limit for submitting claims is listed in your contract with the carrier which appears on the reverse side of the Bill of Lading.

It is suggested that you file your claim as soon as possible. Please place any telephone numbers or contact numbers you wish us to use on the claim form.

Sincerely,
John Falbe
Customer Service Representative
P.O. Box 1550
San Pedro, California 90733

JF:ewf

EXHIBIT "5"

GEMINI
Moving Specialists
7241 Lankershim Boulevard,
P.O. Box 3040
North Hollywood, California 91605

Los Angeles, 875-0470
Valley, 983-0717 / 765-3521

655-103-1
Hunter-Jukes

September 8, 1981

Mrs. Gina F. Brandt
9111 Beverlywood Street
Los Angeles, Ca. 90034

Dear Mrs. Brandt:

Normally, the carrier must be given the opportunity to inspect any claimed damage before the owner of the goods removes the item or items claim to a location other than that to which delivery was made by the carrier. If the driver acknowledges the damage claimed, or if exceptions were taken in writing on the inventory at time of delivery, establishment of when the claimed loss or damage occurred is facilitated.

As previously advised, prompt attention will be given your claim as soon as it is received together with copies of the freight bill and inventory. If no exceptions were taken at time of delivery on the inventory, the driver will be contacted for verification of the damage and/or loss claimed.

For further information regarding the liability of the carrier, if the information you have received from us is

not satisfactory, it is suggested that you contact the Interstate Commerce Commission. Their Los Angeles address is 300 N. Los Angeles Street, Los Angeles, Ca. 90061. Telephone 688-4008.

It is again suggested that you submit your claim at your earliest opportunity.

Sincerely,

John Falbe
Customer Service Representative

cc. 566
cc. UVL

EXHIBIT "6"

[Illegible]

December 21, 1981

Mrs. Gina Brandt Hunter
9111 Beverly Wood St.
Los Angeles, CA 90034

Re: Order No. 655-103-81-95

Dear Mrs. Hunter:

Your report from Trilco, Inc., has been received and we are now in a position to completely conclude this claim with you.

After reviewing our file we find our settlement to be as follows:

#224/225/226/227 Brass bed, declined.	
#229 Tall cabinet, declined.	
#318 Drop leaf table, declined.	
#320 Desk, declined.	
#351 Rocker, declined.	
#371 Wicker sofa, declined.	
#203 Bookcase, amount allowed	$20.00
#209 Small stand, amount allowed	$75.00
#217 Chinese plate, amount allowed	$45.00
#329 Sofa, amount allowed	$50.00
Double boiler, amount allowed	$25.00
Lasagna pan, amount allowed	$45.00
Copper mold, amount allowed	$ 5.00
Tin mold, amount allowed	$ 2.00
Copper tray, amount allowed	$ 5.00
Juice squeezer, amount allowed	$ 3.00
Five cupcake pans, amount allowed	$ 2.00
Strainer, amount allowed	$ 2.00

(continued)

Books, amount allowed	$ 8.00
#238 Crystal relish dish, amount allowed	$15.00
#272 Doll china cabinet, amount allowed	$10.00
#299 Hardcover books, amount allowed	$10.00
#353 Bookcase, amount allowed	$30.00
Automobile, has been repaired.	
Five paperback books, amount allowed	$ 2.50
Total cash settlement — $360.00.	

We have declined the first few items on your claim as a review of the inventory indicates that these items were removed from the place of delivery to another address before the carrier had the right of inspection on these items. Since this is the case and we do not have exceptions to indicate the damage was caused by the carrier before it was removed from the delivery address, we cannot accept responsibility for these items.

We are enclosing our check in the amount of $360.50 for full and final settlement on your claim.

Thank you for your kind attention and hoping you understand our position, I remain,

Respectfully,

Michael P. Dulle
Claims Department

MPD/ne
cc: John Falbe
191 — Crown
655 — Lewis
66 — Admiral

EXHIBIT "7"

January 13, 1982

Mrs. Gina Brandt Hunter
911 Beverlywood St.
Los Angeles, CA 90034

Re: Order No. 655-103-81-95

Dear Mrs. Hunter

With reference to our phone conversation concerning the above captioned claim and the dining room table.

We have contacted the driver who has substantiated your comments on this table, therefore, we are going to allow one half of the cost of repair to this item per Trilco's estimate. The cost of repair per this estimate is $450.00, therefore, we are going to allow $225.00 as our liability on this particular item. This allowance is for new in transit damage taking into consideration this item was moved before inspection therefore, we cannot determine when the damage actually occurred.

Concerning the balance of the items that were declined on your claims we are again denying these items as they were removed from the place of delivery to another address before we had the right of inspection on these items. In speaking with the driver, he does not indicate any damage to those items, therefore, we cannot be responsible for them.

I am enclosing a check for full and final settlement on this additional portion of your claim. We thank you for allowing United to be of service.

Respectfully,

Michael P. Dulle
Claim Department

MPDpb

VERIFICATION

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I, the undersigned, say:

I have read the foregoing COMPLAINT FOR DAMAGES FOR BREACH OF WRITTEN CONTRACT, TORTIOUS BAD FAITH, INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS, FRAUD & INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND ATTY'S FEES and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

Executed on February 6, 1982, at Los Angeles California.

I declare under penalty of perjury that the foregoing is true and correct.

JAMES K. T. HUNTER

APPENDIX M

Tariff No. 400-A.

ICC HGB 400-A
Cancels
ICC HGB 400

Household Goods Carriers Bureau
Agent

TARIFF NO. 400-A
(Cancels Tariff No. 400)
Naming
Local, Joint, Distance and Commodity Rates
Also Export-Import Rates
on
HOUSEHOLD GOODS
Between Points Within the United States
(Except will not apply to or from Alaska or Hawaii)
Between Points in the United States
on the One Hand, and on the Other,
Points in Canada and Mexico
(Except will not apply to or from Alaska or Hawaii)
Between Points and Places in Hawaii.

For Governing Publications, see Page 3 of tariff "Governing Tariffs".

Distance or mileage commodity rates shown herein may be used only when no commodity rates (other than distance commodity rates) have been published to apply from and to the same points over the same route.

The provisions published herein, if effective, will not result in an effect on the quality of the human environment.

This tariff contains a changed basis of rates and provisions resulting in increases, reductions and changes in wording resulting in neither increases nor reductions, which are not shown by the use of Uniform Symbols as required by 49 CFR 1310.6 and symbols have been omitted

in this instance under Special Tariff Authority Decision No. 79-3395-M. (See Page 3 of tariff "Formula For Publishing Transportation Rates and Charges Shown Herein".)

ISSUED: OCTOBER 19, 1979 EFFECTIVE: DECEMBER 3, 1979

ISSUED BY F. L. WYCHE, Executive Secretary, 2425 Wilson Boulevard, Arlington, Virginia 22201.

SECTION 1
RULES AND OTHER PROVISIONS WHICH GOVERN THE TARIFF
APPLICATION

Governs all sections of this tariff unless otherwise provided within individual sections.

Except as otherwise provided herein, the rates named in this tariff include one pickup and loading at point of origin and one delivery and unloading at point of destination.

The joint rates published herein include all charges for drayage or other transfer services at intermediate transfer points on shipments handled through and not stopped for special services at such intermediate transfer points.

ITEM 1
BILL OF LADING AND RATES

(a) Unless otherwise provided in this tariff, when property is transported subject to the provisions of this tariff, or as amended, the acceptance and use of the Uniform Household Goods Bill of Lading as described herein is required.

If the bill of lading is issued on the order of the shipper, or his agent, in exchange or substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election for common law or bill of lading liability, in or in connection with

such prior bill of lading, shall be considered a part of the original bill of lading as fully as if the same were written or made in connection with the original bill of lading.

Any alteration, addition or erasure on a bill of lading which shall be made without the special notation thereon of the agent of the carrier issuing the bill of lading shall be without effect and the bill of lading shall be enforceable according to its original tenor.

(b) The rates and charges shown herein are reduced rates conditioned upon the use of the Uniform Household Goods Bill of Lading. Consignor, at his option, may elect not to accept the terms of the Uniform Household Goods Bill of Lading, and in lieu thereof to have the carrier transport the property with the carrier's liability limited only as provided by common law and by the laws of the United States and the several States insofar as they apply, but subject to the terms and conditions of the Uniform Household Goods Bill of Lading insofar as such terms and conditions are not inconsistent with such common carrier's liability; the rate charged therefor will be 100 percent higher than the transportation rate contained in this tariff as would apply for such shipment if offered for transportation at a released value not exceeding 60 cents per pound, per article.

When the consignor elects not to accept any of the terms of such bill of lading he must give notice to the initial carrier of such election. The initial carrier must indicate the receipt of such notice by writing or stamping thereon a clause signed by the carrier reading:

> "In consideration of the higher rate charged, the property herein described will be carried, and the services to be rendered hereunder will be performed, with the carrier's liability limited only as provided by law; but

subject to the terms and conditions of this bill of lading insofar as they are not inconsistent with such common carrier's liability."

(c) All rates and charges herein are dependent upon the shipment being released in accordance with the provisions of Item 3 of this tariff.

(d) Unless the shipper expressly releases the shipment to a value not exceeding 60 cents per pound per article, the carrier's maximum liability for loss and damage shall be either the lump sum value declared by the shipper or an amount equal to $1.25 times the actual weight in pounds of the shipment, whichever is greater. For this liability, additional valuation charges as provided in Item 190 will apply. If the shipper wishes to avoid these additional charges, he must agree that if any articles are lost or damaged, the carrier's liability will not exceed sixty (60) cents per pound for the actual weight of any lost or damaged article in the shipment.

ITEM 3

DECLARATION OF VALUE - LIABILITY LIMITATION

(a) As used in this tariff, the phrases, "released value", "declared value", and "value declared by the shipper" shall have the same meaning.

(b) The carrier's maximum liability shall be either, (1) $1.25 times the actual weight (in pounds) of the shipment of the declared lump sum value, whichever is greater; or (2) sixty (60) cents per pound for the actual weight of any lost or damaged article or articles, if the shipment has been expressly released by the shipper to such value per article. Unless the shipper expressly releases the shipment to a value not exceeding 60 cents per pound per article, the

carrier's maximum liability for loss and damage shall be either the lump sum value declared by the shipper or an amount equal to $1.25 for each pound of weight in the shipment, whichever is greater.

(c) The released value must be entered on the bill of lading in the following form and may be completed only by the person signing the bill of lading.

> The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper hereby releases the entire shipment to a value not exceeding
>
> _____
>
> (to be completed by the person signing below)
>
> NOTICE: THE SHIPPER SIGNING THIS CONTRACT MUST INSERT IN THE SPACE ABOVE, IN HIS OWN HANDWRITING, EITHER HIS DECLARATION OF THE ACTUAL VALUE OF THE SHIPMENT, OR THE WORDS "60 cents per pound per article". OTHERWISE, THE SHIPMENT WILL BE DEEMED RELEASED TO A MAXIMUM VALUE EQUAL TO $1.25 TIMES THE WEIGHT OF THE SHIPMENT IN POUNDS.
>
> _____
>
> (Shipper)
>
> _____
>
> (Date)

Provided that: Where the shipper is the employer of the actual owner of the household goods being transported and is responsible for all transportation charges in connection with such a move, the shipper may instruct the motor carrier to release the shipment

to a value of 60 cents per pound per article (a) by specification made on a purchase order, or (b) by issuing, in advance of the shipping date, appropriate letters of instruction to the carrier. In such instances, the motor carrier must incorporate the instructions by reference to the document in (a) or (b) above in the bill of lading in lieu of the personal signature and handwritten statement relating to released rates.

(d) If the shipper fails to make the entry required in subsection (c) of this rule, the shipment will be deemed released to an amount equal to $1.25 times the actual weight of the shipment (in pounds).

(e) The released value and the carrier's maximum liability (whether or not loss or damage occurred from carrier negligence), as determined under this rule, shall apply to any claims resulting from the performance or failure to perform by carrier of any services, including accessorial services, which carrier has contracted to perform.

(f) Rates or charges herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order No. MC-505 of June 7, 1966, subject to complaint or suspension.

* * *

ITEM 19

CLAIMS

(a) *Claims in writing required.* A claim for loss, damage, injury, or delay will not be voluntarily paid by a carrier unless filed in writing as provided in subparagraph (b) below with the receiving or delivering carrier, or carrier issuing the bill of lading, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the

specified time limits applicable thereto, and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(b) *Minimum filing requirements.* A communication in writing from a claimant filed with carrier within the time limits specified in the bill of lading or contract of carriage or transportation, and (i) containing facts sufficient to identify the shipment (or shipments) of property involved, (ii) asserting liability for alleged loss, damage, injury, or delay, and (iii) making claim for the payment of a specified or determinable amount of money, will be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers on their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, will, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in subparagraph (b) above.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against carrier for an uncertain amount, such as "$100 more or less" carrier will determine the condition of the shipment involved at the time of delivery by it, if it was delivered, and will ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It will not however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money will have been filed in accordance with the provisions of subparagraph (b) above.

(e) *Other claims.* If investigation of a claim develops that one or more other carriers has been presented with a similar claim on the same shipment, the carrier investigating such claim will communicate with each such other carrier and, prior to any agreement entered into between or among them as to the proper disposition of such claim or claims, will notify all claimants of the receipt of conflicting or overlapping claims and will require further substantiation, on the part of each claimant of his title to the property involved or his right with respect to such claim.

(f) *Concealed damage or shortage.* Carrier must be promptly notified after discovery of concealed damage or shortage and given reasonable opportunity to inspect the shipment and packing. Carrier will promptly and thoroughly investigate the claim and will establish a claim file in connection therewith.

(g) *Supporting documents.* When a necessary part of an investigation, each claim must be supported by the original bill of lading (if not previously surrendered to the carrier), either the original paid bill for transportation services or a photographic copy thereof, and for each article, the nature and extent of such damage, the basis for the amount claimed, i.e., date article purchased, original cost, amount of depreciation, actual cash value at time of loss or damage and, in the case of damage, a repair estimate.

(h) *Verification of loss.* When an asserted claim for loss of an entire package or an entire shipment cannot be otherwise authenticated upon investigation, the carrier will obtain from the consignee of the shipment involved a certified statement in writing that the property for which the claim is filed has not been received from any other source.

(i) *Satisfaction of claims.* Carrier may satisfy a claim by repairing or replacing the property lost or damaged with materials of like kind, quality and condition at time of acceptance by carrier.

(j) *Constructive weight of packed interior shipping containers.* When the liability of the carrier is to be measured by the weight of the article lost or damaged, and such article is packed in an interior shiping container, in the absence of specific evidence to the contrary, such interior shipping container will be deemed to have the following weight:

Container	Weight Per Container (In Pounds)
DRUM, DISH-PACK	60
CARTONS: Less than 3 cu. ft.	25
3 Less than 4½ cu. ft.	30
4½ Less than 6 cu. ft.	35
6 Less than 6½ cu. ft.	45
6½ cu. ft. and over	50
Wardrobe Carton	50
Mattress or Box Spring Carton (Not exceeding 39" x 80")	55
Mattress or Box Spring Carton (Not exceeding 54" x 75")	60
Mattress or Box Spring Carton (Exceeding 54" x 75")	80
Crib Mattress Carton	22

NOTE 1: Cartons containing books or phonograph records will be deemed to weigh 50 pounds.

NOTE 2: Cartons containing lamp shades will be deemed to weigh 10 pounds.

NOTE 3: Items not identified on the inventory as to contents will be settled for the heaviest weight on the schedule for the container.

(k) *Time limit for filing claims.* As a condition precedent to recovery, a claim for any loss, damage, injury, or delay,

must be filed in writing with carrier within nine (9) months after delivery to consignee as shown on bill of lading, or in case of failure to make delivery, then within nine (9) months after a reasonable time for delivery has elapsed; and suit must be instituted against carrier within two (2) years and one (1) day from the date when notice in writing is given by carrier to the claimant that carrier has disallowed the claim or any part or parts thereof specified in the notice. Where a claim is not filed or suit is not instituted thereon in accordance with the foregoing provisions, carrier will not be liable and such claim will not be paid.

(l) *Acknowledgement and settlement by carrier.* Carrier will acknowledge receipt of each claim in writing to the claimant within 30 calendar days after its receipt by the carrier or the carrier's agent. Carrier will at the time such claim is received, cause the date of receipt to be recorded on the claim.

Carrier will pay, decline, or make a firm compromise settlement offer in writing to the claimant within 120 days after receipt of the claim by the carrier or its agent: Provided, That, if the claim cannot be processed and disposed of within 120 days after the receipt thereof, the carrier will at that time and the expiration of each succeeding 30-day period while the claim remains pending, advise the claimant in writing of the status of the claim and the reasons for the delay in making final disposition thereof, and send a copy of such letter to the District Supervisor, Interstate Commerce Commission, Bureau of Operations, of the area in which the carrier has its principal place of business.

(m) *Salvage.* Whenever property transported by a carrier is damaged or alleged to be damaged and is, as a consequence thereof, not delivered or is rejected or refused upon tender thereof to the owner, consignee, or person

entitled to receive such property, carrier, after giving due notice, whenever practicable to do so, to the owner and other parties that may have an interest therein, and unless advised to the contrary after giving such notice, will undertake to sell or dispose of such property directly or by the employment of a competent salvage agent. Carrier will only dispose of the property in a manner that will fairly and equally protect the best interests of all persons having an interest therein. Carrier will make an itemized record sufficient to identify the property involved so as to be able to correlate it to the shipment or transportation involved, and claim, if any, filed thereon. Carrier also will assign to each lot of such property a successive lot number and note that lot number on its record of shipment and claim, if any claim is filed thereon.

Upon receipt of a claim on a shipment on which salvage has been processed in the manner hereinbefore described, carrier will record in its claim file thereon the lot number assigned, the amount of money recovered, if any, from the disposition of such property, and the date of transmittal of such money to the person or persons lawfully entitled to receive the same.

Whenever disposition of salvage material or goods shall be made directly to an agent or employee of a carrier or through a salvage agent or company in which the carrier or one or more of its directors, officers, or managers has any interest, financial or otherwise, that carrier's salvage records shall fully reflect the particulars of such transaction or relationship, or both as the case may be.

%NOTE: See ITEM 47 for provisions governing DEPRECIATION FACTOR ON CLAIMS FOR LOST OR DAMAGED ITEMS.

• • •

ITEM 42

INFORMATION TO BE INCLUDED ON FACE OF UNIFORM HOUSEHOLD GOODS BILL OF LADING

(1) The Uniform Household Goods Bill of Lading issued for any shipment accepted for transportation and storage shall have printed in *distinctive color* in *boldface type* on the face thereof a statement reading as follows:

> Unless the shipper expressly releases the shipment to a value of 60 cents per pound per article, the carrier's maximum liability for loss and damage shall be either the lump sum value declared by the shipper or an amount equal to $1.25 for each pound of weight in the shipment, whichever is greater.
>
> The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper hereby releases the entire shipment to a value not exceeding
>
> _____
>
> (to be completed by the person signing below)
>
> NOTICE: THE SHIPPER SIGNING THIS CONTRACT MUST INSERT IN THE SPACE ABOVE, IN HIS OWN HANDWRITING, EITHER HIS DECLARATION OF THE ACTUAL VALUE OF THE SHIPMENT, OR THE WORDS "60 cents per pound per article", OTHERWISE, THE SHIPMENT WILL BE DEEMED RELEASED TO A MAXIMUM VALUE EQUAL TO $1.25 TIMES THE WEIGHT OF THE SHIPMENT IN POUNDS.
>
> _____
>
> (Shipper)
>
> _____
>
> (Date)

Provided that: Where the shipper is the employer of the actual owner of the household goods being transported and is responsible for all transportation charges in connection with such a move, the shipper may instruct the motor carrier to release the shipment to a value of 60 cents per pound per article (a) by specification made on a purchase order, or (b) by issuing, in advance of the shipping date, appropriate letters of instruction to the carrier. In such instances, the motor carrier must incorporate the instructions by reference to the document in (a) or (b) above in the bill of lading in lieu of the personal signature and handwritten statement relating to released rates.

(2) In addition to the above statement printed in distinctive color in boldface type, the following information must appear on the face of the Uniform Household Goods Bill of Lading:

(a) The name and address of the motor carrier (not the agent's name and address) which will transport the shipment; if the shipment is to be interlined, the name and addresses of all connecting carriers which will transport the shipment.

(b) The name, address and telephone number of the office of the carrier issuing the receipt or bill of lading that should be contacted in relation to the shipment, should there be a need for such contact.

(c) The name, address and telephone number of a person to whom notification of delay in delivery shall be given, except when this cannot be obtained from the shipper.

(d) The actual pick-up date and the agreed delivery date or the agreed period of time within which delivery of the shipment is expected at destination.

(e) The tare, gross and net weights of the shipment. On the same line on which the tare weight is to be entered there shall be printed the words: "Shipper: The tare weight of the vehicle must be entered on this line prior to loading your shipment on the vehicle."

(f) The number of the vehicle onto which the shipment is loaded.

(g) The amount of estimated charges and method of payment of total tariff charges.

(h) Maximum amount required to be paid in cash, certified check, traveler's check, or bank check (one drawn by a bank on itself and signed by an officer of the bank) to relinquish possession of a C.O.D. shipment on which actual charges exceed estimated charges.

(i) Whether shipment requires notification of actual charges and where such communication shall be received.

(3) Across the bottom of the Uniform Household Goods Bill of Lading, and copies thereof, there shall be printed in red letters not less than ⅛" high the words:

"Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall knowingly and willfully neglect or fail to make full, true, and correct entries or who shall knowingly and willfully falsify, destroy, multilate, or alter this receipt or bill of lading, shall be subject to a penalty of $5,000 for each such offense. (Sec. 222; 49 U.S.C. 322)"

• • •

ITEM 47

DEPRECIATION FACTOR ON CLAIMS FOR LOST OR DAMAGED ITEMS

When settling a claim for loss or damage, carrier shall use the replacement cost of the lost or damaged item as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item; provided that where an item cannot be replaced or no suitable replacement is obtainable, the proper measure of damages shall be the original cost, augmented by a factor derived from a consumer price index, and adjusted downward to reflect depreciation over average useful life.

NOTE: This rule will take precedence over corresponding provisions of ITEM 19, Claims.

formity on one subject or another. Although oft repeated — perhaps *because* it is so often repeated — the bromide loses some of its persuasive effect unless reinvigorated by reference to the relevant background facts. As pertains to interstate carriers, the background facts are uncomplicated. We start with the proposition that an interstate carrier must serve all who ~~supply~~ apply to it for its service in a non-discriminatory manner. The relation of a carrier to its customer is not entirely private nor consensual. Further, Congress has determined that the smooth flow of goods from state to state should not be inhibited by the spectre of randomly and unpredictably different legal results which might pertain in the various states.

A simple example should suffice: Suppose that a person tenders freight to a carrier in California valued (for the sake of this argument) at $100.00. The federal law on the subject is that if the carrier loses those goods "the liability imposed under [the Carmack Amendment] is for the actual loss or injury to the *property*..." It should also be noted that the carrier is going to be liable for that damage to the property without any proof of negligence or causation or "fault". The shipper or other owner of the property will make out a prima facie case if it shows that the property was delivered to the carrier in good condition, was either lost or delivered back from the carrier in worse condition and the amount of damages attributable to the loss or the damage. See *Missouri & Pacific Ry. v. Elmore & Stahl*, 377 U.S. 134, 84 S.Ct. 1142 (1964). It is manifestly unacceptable that a carrier confront different magnitudes of legal peril depending on where the freight is supposed to be delivered. It should not matter whether the freight is to be delivered in Nevada or Texas or Georgia or Mississippi or New York or Maine; the carrier should be out of pocket no more than enough to compensate the owner of the goods for the "actual loss or injury to the property". It is simply

not competent for the various states to randomly increase (or for that matter decrease) a common carrier's liability dependent upon where the freight might be delivered. These arbitrary variations in carrier liability are just as unacceptable when labeled "intentional infliction of emotion distress" or "tortious interference with contractual advantage" or "breach of the covenant of good faith and fair dealing". No matter how hard one attempts to characterize what is fundamentally a federal cargo damage question as a state tort remedy, the result stays the same: A carrier would be subjected to varying levels of liability dependent upon where the owner of the property desired his freight carried.

This is *precisely* the type of result which the Congress sought to prevent when it abolished all remedies arising from the damage or loss of cargo except such as could be gleaned from the Carmack Amendment and from other federal statutory and common law sources. The proviso formally contained in the Carmack Amendment and now contained in 49 USC §10103, which essentially provides that the remedies provided for under the Act are "in addition to remedies existing under another law or at common law," preserves only rights and remedies under *federal* law. Rights and remedies under state law are not likewise preserved. *Adams Express Co. v. Croninger,* 226 U.S. 491, 507-508, 33 S.Ct. 155 (1912); *Chicago, B. & Q. R. Co. v. Miller,* 226 U.S. 513, 33 S.Ct. 155 (1913); *Charleston & W. C. R. Co. v. Varnville Furniture,* 237 U.S. 597, 35 S.Ct. 715 (1915); *St. Louis, I.M. & S. R. Co. v. Starbird,* 243 U.S. 592, 37 S.Ct. 462 (1917).

It is not merely carriers who are well served by consistency in the remedies which inheres in a uniform federal standard. The shippers and consignees of freight are also beneficiaries of this scheme. It requires no citation to observe that the preeminent purpose of the enactment of

the Interstate Commerce Act was to prevent discrimination in respect of the transportation of goods for hire and to permit shippers and receivers of freight to receive transportation services on an equal footing with each other. If the remedies of the owner of goods was made to depend on the location of the courthouse where he had to bring his action against a carrier, the spectre of non-uniform litigation results would create non-uniform consequences (or benefits) to owners of property whose goods had been subjected to an identical quantum of injury. What the Ninth Circuit suggests is that the uniform national standards applicable to cargo damage be put asunder. The practical reality is that if state law is permitted to control any part of the recovery, the competitor/manufacturer who lives in the most generous state will have a distinct advantage over his fellows either because either (a) the threat of catastrophic damages forces the carrier to compromise sooner or at a greater level of compensation than would otherwise be the case, or (b) upon litigation, the manufacturer/competitor is able to recover under a state damage theory a number of dollars greatly in excess of the value of the goods which were lost or damaged.

That result flies in face of the clear national interest (embraced by an unmistakably clear Congressional policy) that shippers and consignees of freight be treated equally and not suffer disadvantage because of their locale. A simple way to effectuate this is the way that Congress chose and this Court has upheld: Unless federal law recognizes a remedy for loss or damage to property moving in interstate commerce, there is *no* remedy. Everybody is treated equally. No one gathers unto himself untoward leverage and no one is permitted to recover windfalls. There is no reason to depart from this rule.

IV

CONCLUSION

There is compelling reason to reverse here. The plain mandate of this Court and of Congress is that cases involving injury to cargo arise under an Act of Congress regulating commerce and that the damages to be awarded are delimited by the common law as applied by federal tribunals. Where, as here, more than $10,000 is claimed as damages, federal jurisdiction cannot and should not be sidestepped. This Court should take this opportunity to make what is already clear even clearer: No matter how fanciful a plaintiff's allegations may be, a cargo damage case, assuming it meets the $10,000 threshold, will be amenable to removal to federal court.

Oddly enough, by underscoring that federal jurisdiction lies in cases of this kind, this Court could actually reduce the number of cargo loss cases which make their way into the federal court system. This case is a classic example. Not one single person who has read the pleadings in this case — not the state law judge, not the federal trial judge and not the federal appeals judges — believe that the plaintiffs have been truly injured to an extent exceeding $2,500, the amount pleaded in their first cause of action. Notwithstanding the rather modest quantum of damage which is actually involved here, these plaintiffs, like plaintiffs everywhere, have sought to gain leverage over the defendant by pleading exotic (but inextricably interconnected) theories in order to propel the damages from the low thousands into the high millions. The price that a plaintiff pays to do this of course is that, as here, the case can be removed.[5] If this

[5]This is a significant penalty. Counsel for *amici* has litigated on both sides of cargo damage cases. The threat that a state court judge will simply ignore the limitations on damages that inhere in the federal system is a trump card of significant value. The settlement value of a case in a California state court is half again (or more) higher than the same case removed to federal court.

Court makes it crystal clear that such cases will be removed and will not thereafter be remanded, hundreds and probably thousands of cargo damage cases which are routinely (and appropriately) removed to federal court because of the bloated damage requests will stay in state court where they belong. In simple words, if a plaintiff knows that puffing his damages will cause his removal from the comfortable precincts of state court, the amounts pleaded as damages may begin to bear some rough relationship to the damages actually incurred.

This Court has not spoken in a comprehensive way to the cargo loss and damage area for more than twenty years. There are a number of issues which have developed and will require this Court's attention in the very near term future. This is one of those subjects.

This Court should grant the petition for writ of certiorari and summarily reverse the Ninth Circuit.

Respectfully submitted,

GARFIELD, TEPPER & ASHWORTH
By CHRISTOPHER ASHWORTH

Attorney for Amici Curiae

Office-Supreme Court, U.S.
FILED
JUN 14 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1559

In The
SUPREME COURT OF THE
UNITED STATES

October Term, 1984

UNITED VAN LINES, INC.,

Petitioner,

vs.

JAMES K.T. HUNTER and
GINA F. BRANDT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES K.T. HUNTER
GINA F. BRANDT
9111 Beverlywood St.
Los Angeles, California 90034
(213) 837-1318

Appearing pro se

TABLE OF CONTENTS

		PAGES
I	THE NINTH CIRCUIT SHOULD NOT BE DIRECTED TO RECONSIDER THE OPINION BELOW IN LIGHT OF ALLIS-CHALMERS	1
II	THIS COURT SHOULD NOT GRANT THE PETITION FOR CERTIORARI. .	5
III	CONCLUSION	9

TABLE OF AUTHORITIES

Case:

Allis-Chalmers Corporation v. Loueck (No. 83-1748) ____U.S.____, ____S.Ct.____, ____L.Ed.2d____ . . 1-9

I

THE NINTH CIRCUIT SHOULD NOT BE DIRECTED TO RECONSIDER THE OPINION BELOW IN LIGHT OF ALLIS-CHALMERS

It is self evident that this Court should not direct the Ninth Circuit to reconsider the opinion below in light of Allis-Chalmers Corporation v. Loueck (No. 83-1748) ("Allis-Chalmers") in the absence of any patent or latent inconsistency between those opinions. In determining if such an inconsistency exists, two potential impacts of Allis-Chalmers on the issues presented in the action below appear -- namely:

1. the state law claim for tortious bad faith may be determined to be preempted by federal law; and

2. federal common law may be determined to provide a remedy for tortious bad faith.

While these potential impacts admittedly would be extremely significant to the substantive issues presented by this action, a review of the opinion below establishes that neither impact would create any patent or latent inconsistency with the ruling on the jurisdictional issue decided in the opinion below. Thus, the opinion below expressly provides that its ruling on the jurisdictional issue is independent of the ultimate resolution of either of the substantive issues potentially impacted by Allis-Chalmers.

More particularly, in Part I of the opinion below, the Ninth Circuit held that federal jurisdiction over this action was lacking regardless of whether Respondents' "state-law" claims were preempted by federal law since "the federal claim appears by way of defense". Petition, A-11. Thus, the determination

that Respondents' "state-law" claims are preempted by federal law is irrelevant to the Ninth Circuit's determination of the jurisdictional issue.

With respect to whether federal common law in fact replaces state law by providing a remedy for tortious bad faith, that determination, if made by the Ninth Circuit, would have been relevant to the Ninth Circuit's discussion of jurisdiction based on artful pleading. Petition, A-12 through A-20. Yet the Ninth Circuit held that the issue of the existence of a federal common law remedy was not raised in the specific circumstances of this case because Defendants below "failed to argue, let alone demonstrate, that federal law affords Plaintiffs a remedy for the injuries they claim they suffered". Petition, A-19. See also Petition, A-19, fn. 5.

In sum, this Court's recent decision in Allis-Chalmers arguably would have warranted a direction to the Ninth Circuit for the reconsideration of the opinion below if that opinion had purported to determine either of the substantive issues heretofore discussed. The opinion below, however, does not so purport. To the contrary, it holds that in light of the specific, unique circumstances presented below, neither of those substantive issues required or merited resolution in connection with the Ninth Circuit's determination of the jurisdictional issue. While this Court may disagree with this holding of the Ninth Circuit, such holding is not in any manner impacted by the decision in Allis-Chalmers, and, accordingly, no purpose would be served by directing the Ninth Circuit to reconsider the opinion below in light of Allis-Chalmers. Quite

simply, since the opinion below is premised on its holdings that the substantive issues are irrelevant to the determination of the jurisdictional issue therein decided, no purpose would be served by ordering the reconsideration of that opinion in light of an opinion which does not even purport to address such holdings, but merely addresses the "irrelevant" substantive issues.

II

THIS COURT SHOULD NOT GRANT THE PETITION FOR CERTIORARI

The same factors which dictate that this Court should not direct the Ninth Circuit to reconsider the opinion below in light of Allis-Chalmers similarly dictate this Court's denial of the Petition. Thus, by virtue of the unique facts bearing on the jurisdictional issue presented below, the opinion below is in no sense contradicted by Allis-Chalmers.

Nor would this Court's review of the opinion below present a proper vehicle for this Court's determination of either of the substantive issues arguably impacted by Allis-Chalmers. With regard to the federal preemption issue, the Ninth Circuit is clearly correct in deciding that that issue need not, and should not, be determined in the context of the preliminary jurisdictional issue.

With regard to the federal common law issue, the Ninth Circuit properly determined that Petitioner's (and all other parties') failure to argue that such a remedy existed in support of removal jurisdiction relieved that Court of the responsibility for sua sponte analyzing and determining this issue. If the parties with the burden of sustaining removal "jurisdiction" fail to contend that federal common law displaces state law, the courts should

not have the unilateral obligation in the absence of any request or guidance by the parties to raise and decide an important and novel constitutional issue. In any event, even if this determination by the Ninth Circuit were erroneous, such determination is not contradicted by any decision of this Court, is not in conflict with the decision of any other Court of Appeals and is not itself sufficiently important to merit the attention of this Court.

Furthermore, even if this Court disagrees with the Ninth Circuit's decision not to consider and determine the federal common law issue, this case does not constitute a proper vehicle for this Court to determine that issue. Since none of the parties or lower courts addressed, much less determined, the federal common law issue below, this Court should await the arrival of a case

wherein such issue is so addressed before considering it.

Indeed, in light of Allis-Chalmers, it is inevitable that carriers and/or shippers will be addressing the federal common law issue in the future, both with respect to the jurisdictional and substantive issues.[1] There simply is no adequate rationale for deciding the substantive issues raised by Allis-Chalmers in the context of this case as opposed to awaiting the more appropriate cases to come -- particularly when the

---

[1] In fact, when and if this case is remanded to state court, Respondents will argue that federal common law provides an alternative basis for carrier liability for tortious bad faith in the event state law is preempted from providing such a remedy.

case law may develop in a manner which will moot the necessity for intervention by this Court.

III

CONCLUSION

At first glance, the issues addressed in Allis-Chalmers and in the opinion below appear strikingly similar. Yet a closer analysis of those issues establishes the existence of crucial differences between the substantive and jurisdictional issues therein addressed. These differences dictate not only the denial of the Petition, but also the refusal to direct Ninth Circuit's reconsideration of the opinion below in light of Allis-Chalmers.

DATED: June 11, 1985

Respectfully submitted,

JAMES K. T. HUNTER,
GINA F. BRANDT
9111 Beverlywood Street
Los Angeles, California
90034
(213) 837-1318

Appearing pro se

Office-Supreme Court, U.S.
FILED
MAY 1 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1559

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

UNITED VAN LINES, INC.,
Petitioner

vs.

JAMES K.T. HUNTER and
GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

AMICI CURIAE BRIEF

Consolidated Freightways Corp. of DE and Transcon Lines, Inc.

CHRISTOPHER ASHWORTH
1925 Century Park East
Suite 1250
Los Angeles, Calif. 90067
(213) 277-1981
Attorneys for Amici

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

TABLE OF CONTENTS

Page

I

REASONS WHY THE PETITION FOR CERTIORARI MUST BE GRANTED 1

II

THE FEDERAL PREEMPTIVE TENT 2

III

THE NEED FOR NATIONAL UNIFORMITY 7

IV

CONCLUSION 11

TABLE OF AUTHORITIES

Cases	Page
Adams Express Co. v. Croninger, 226 U.S. 491 (1913)	5, 9
Atchison, Topeka & S.F. Ry. v. Harold, 241 U.S. 371, 26 S.Ct. 665 (1916)	4, 5
Charleston & W.C.R.Co. v. Varnville Furniture, 237 U.S. 597, 35 S.Ct. 715 (1915)	9
Chicago, B & Q R. Co. v. Miller, 226 U.S. 513, 33 S.Ct. 155 (1913)	9
Emery & Co. v. American Refrigerator Co., 246 U.S. 634, 38 S.Ct. 414 (1918)	5, 6
Missouri & Pacific Ry. v. Elmore & Stahl, 377 U.S. 134, 84 S.Ct. 1142 (1964)	8
National Garment Co. v. New York, C & St.L.R.Co., 173 F.2d 32 (8th Cir. 1949)	5
Schaeffer, Inc. v. Minneapolis, Northfield & So. Ry. Co., 254 Minn. 248, 94 N.W.2d 551 (1938)	5, 6
St. Louis, I.M. & S.R. Co. v. Starbird, 243 U.S. 592, 37 S.Ct. 462 (1917)	9
Sylgab Steel & Wire Corp. v. Strickland Transportation Co., 270 F.Supp. 264 (E.D.N.Y. 1967)	2
Thurston Motor Lines v. Jordan K. Rand, ____ U.S. ____, 103 S.Ct. 1343 (1983)	1
White Cross Hospital v. Chesapeake & Ohio R.R. Co., 125 N.E. 2d 363 (Ct.App.Ohio 1953)	5

Statutes	
United States Code, Title 28, Sec. 1337(a)	1
United States Code, Title 28, Sec. 1445(b)	4, 5
United States Code, Title 49, Sec. 11707	4

Other Authorities	
Removal of Causes to Federal Courts, Report to Accompany H.R. 9994 by Mr. Dyer from the Committee on the Judiciary, H. R. Rep. No. 120, 63rd Cong., 2nd Sess. 1913	5, 6
4 Williston on Contracts, 3194 (Rev.Ed. 1936)	4

I

REASONS WHY THE PETITION FOR CERTIORARI MUST BE GRANTED

This case involves, as material here, a claim exceeding $10,000.00 arising from an interstate common carrier's asserted misfeasance which resulted in damage to cargo.[1] The cause was removed from the state court to federal court. The entire case was later ordered remanded by the Ninth Circuit Court of Appeals.

Since early in this century, this court has uniformly held that cargo damage cases are removable because they are cases "arising under" an Act of Congress regulating commerce.[2] This court has never wavered from the position that when the Interstate Commerce Act speaks to an issue, the federal courts must accept jurisdiction.[3] See, *Thurston Motor Lines v. Jordan K. Rand,* ____ U.S. ____, 103 S.Ct. 1343 (1983). For the second time in as many terms, a panel of the Ninth Circuit has improperly refused to assert jurisdiction. The Ninth Circuit was summarily reversed in *Thurston.*[4] It should be summarily reversed in this case.

---

[1]The second cause of action sounds in "bad faith breach of the covenant of good faith and fair dealing" which inheres in the bill of lading contract and seeks in excess of $5,000,000. In substance, this cause of action complains that United Van Lines processed the plaintiff's claim for cargo damage in a tortious manner.

[2]Former Section 20(11) of the Interstate Commerce Act more commonly known as the Carmack Amendment. Reenacted as 49 USC §11707.

[3]In cargo damage cases recent legislation requires that $10,000 be in controversy before the matter may be heard by a federal court. 28 USC §1337(a). Federal law of course, applies whether the cause is tried in federal or state court.

[4]"... Needless to say, only this Court may overrule one of its precedents. Until that occurs, [our prior precedent] is the law, and the decision below cannot be reconciled with it. The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the cause is remanded to that court for the proceedings consistent with this opinion." 103 S.Ct. at 1345.

II

THE FEDERAL PREEMPTIVE TENT

We start with the indisputable proposition that there is a federal question presented when a person sues a common carrier for damage to freight moving in interstate commerce. A subsidiary (and more refined) question arises in this case and can be stated as follows: Are the claims processing rules of the Interstate Commerce Commission (and the claims processing conduct of an interstate carrier) so inextricably interwoven within the general subject matter of Carmack Amendment liability ('actual injury') so that their asserted violation by a carrier may *not* be parsed out for separate treatment under the general aegis of state "tort" law. Stated in simpler terms, the issue here is whether or not a carrier's claim processing behavior — which indisputably occurs later in time than the actual carriage of goods — is a transportation service whose regulation "arises under" the Interstate Commerce Act.

A fairly recent case authored by Judge Weinstein of the Eastern District of New York analyzed the very problem which confronts us here. In the case of *Sylgab Steel & Wire Corp v. Strickland Transportation Co.*, 270 F.Supp. 264 (E.D.N.Y. 1967), the following facts pertained. The plaintiff delivered a number of machines to the defendant carrier in New York City for transportation to New Orleans, Louisiana. A uniform bill of lading was issued. At the destination, damaged machinery was delivered. After an inspection was made of the damaged machinery, the defendant carrier specifically authorized and directed the plaintiff to repair the machinery and bill the defendant for its expenses. Although the facts stated in the case are not clear, it would appear that the defendant reneged on part of its promise to pay all of the necessary repairs.

In due course, the plaintiff filed its lawsuit in state court. The defendant carrier removed the matter to federal court. The plaintiff thereafter made a motion to remand. The plaintiff's central theme was that the carrier's claims handling, (namely the promises for payment made by the carrier and later reneged upon, which were made subsequent to the actual physical delivery of the goods), is a matter which is governed by state common law and not by the Carmack Amendment. In refusing to remand the case to state court, Judge Weinstein made the following observations about the litigation of "arising under" controversies:

> "At one end of the spectrum of litigation in this country is a relatively small number of instances — including the case before us — where federal law has preempted the field and federal question jurisdiction is clear. At the other end are cases where the federal content is so miniscule as to require us to ignore that ingredient for jurisdictional purposes if we are to maintain the approximate present 'distribution of power between national and state governments' and in the 'daily workings' of federal and state courts. [citations].
>
> In between lie the less clear areas — not involved in the present case — where sophisticated federal question tests are sometimes applied."
>
> • • •
>
> "Subtle language and techniques for probing the heart of complex federal issue questions are confusing when applied to legal abrasions such as the one before us. . ." 270 F.Supp. at 268.

Judge Weinstein then goes on to address himself squarely to the issue of whether post-delivery behavior of the carrier

evinced during the claim processing period "arises under" the Interstate Commerce Act.

> "At this late date there can be little doubt that paragraph 11 of section 20 of title 49 of the United States Code — the Carmack Amendment — [presently 49 USC §11707] preempts the field and supersedes all state common law rights. It provides that 'any common carrier . . . shall be liable . . . for the full actual . . . damage to . . . property' being shipped in interstate commerce. This provision and chapter 4 of title 49 dealing with bills of lading issued by common carriers was designed to avoid the 'confused situation' arising from differences in substantive rights under the laws of the various states. 4 Williston on Contracts, 3194 (Rev.Ed. 1936) Despite some earlier intimations to the contrary [citations], it is now clear that 'the federal government entered and preempted the field of liability for interstate shipments, even though in a particular case the plaintiff, but for the Carmack Amendment, could have recovered at common law.' [citations] 'The liability of a carrier for damage to an interstate shipment is a matter of federal law controlled by federal statutes and decisions.' [citation] The 'prime' object of the Carmack Amendment was 'to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading' so that state law 'on that subject has been excluded.'" Citing *Atchison, Topeka & S. F. Ry. v. Harold,* 241 U.S. 371, 378, 36 S.Ct. 665, 668 (1916).
>
> • • •
>
> "Congressional understanding of the comprehensive nature of federal substantive regulation of the rights of shippers and carriers with respect to damaged goods is clear beyond peradventure. In a Congressional report recommending adoption of the forerunner of

Subdivision (b) of Section 1445 of Title 28, [adopting the former $3,000.00 threshold requirement for removal], the matter was thoroughly discussed. See *Removal of Causes to Federal Courts,* Report to Accompany H. R. 9994, by Mr. Dyer from the Committee on the Judiciary, H. R. Rep. No. 120, 63rd Cong., 2nd Sess., 1913. The report flatly states:

> 'In *Adams Express Co. v. Croninger,* (226 U.S. 491) it was held that Section 20 of the Interstate Commerce Act as amended by the Act of June 29, 1906, abrogates all state and common law liabilities on interstate shipments of property. If in any case *this statute* does not give the plaintiff the right of recovery, *he has none* [emphasis added]. That being true, all cases against railroad companies for loss or damage on interstate shipments of necessity must arise under a "law regulating commerce" '.

What is true of railroads in this respect is true of truck lines."

• • •

"State and federal courts have properly been reluctant to divide the relationship between interstate shippers and carriers into discreet parts, some governed by federal and some by state law. See, *Emery & Co. v. American Refrigeration Co.,* 246 U.S. 634, 38 S.Ct. 414 (1918); *Atchison & Topeka Ry. v. Harold,* 241 U.S. 371, 376, 36 S.Ct. 665 (1916) (second agreement for intrastate shipment not 'new and distinct'); *National Garment Co. v. New York, C. & St. L. R. Co.,* 173 F.2d 32 (8th Cir. 1949) (collateral insurance contract does not supersede obligation under bill of lading); *White Cross Hospital v. Chesapeake & Ohio RR Co.,* 125 N.E.2d 363, 366 (Ct.App.Ohio 1953) (rules with respect to filing of claims subject to federal law); *Schaeffer,*

Inc. v. Minneapolis, Northfield & So. Ry. Co., 254 Minn. 248, 94 N.W.2d 551, 558 (1938) (original bill of lading 'governs the entire transportation'). The courts tend to view events in interstate commerce as part of a total transaction which extends beyond the actual movement across state lines. As in *Emery*, so in the instant case. 'In no aspect can it be maintained that any [cause of action] attempts to allege the primary liability of the defendant . . . otherwise than *as* [*a*] *carrier*. *Emery & Co., supra*, 246 U.S. at 637, emphasis added.

Where the contract between carrier and shipper or receiver [of the goods] to provide compensation for damaged goods is so closely connected to the agreement embodied in the bill of lading as to constitute at most a clarification or modification of that agreement, it is governed by federal law. The *federal preemptive tent* over the main attraction, the bill of lading, covers what is essentially a side show, the agreement by the carrier to repair [Emphasis added]."

• • •

"If the federal policy in favor of unhindered commerce is strong enough to cover the damage claims based upon the bill of lading, it is powerful enough to cover collateral agreements on compensation for damaged goods such as the one in this case." 270 F.Supp. at 268-270.

Judge Weinstein knew what he was talking about. When Congress engrafted the Carmack Amendment onto the Interstate Commerce Act, it did not use a scalpel but rather a meat ax: "If in any case this statute does not give the plaintiff the right of recovery, *he has none*. That being true, all cases against railroad companies for loss or damage or interstate shipments of necessity *must arise under a law regulating commerce*." H.R.Rep. — No. 120, *supra*. When

Congress had worked its will, there was no more state breach of contract action, there was no more state action for negligence, there wasn't even a state action for common carrier's failure to deliver. All that remained was the naked right to pursue a remedy arising under the Carmack Amendment.

Everyone's conduct in the claims processing arena is only relevant and only has substance to the extent that a remedy may be pursued under the Carmack Amendment. If a plaintiff has no right under the Carmack Amendment, he has no right to insist that a carrier handle its claims in any particular way. One "right" completely depends upon the other and is an inextricable part of it. That being so, it cannot either logically or lawfully be claimed that cases which concern themselves with the misfeasance of a carrier in its claims handling procedures do not "arise under" an act of Congress regulating commerce.

Federal law not only preempts the field here, it completely settles the right and the remedy to boot.

III

THE NEED FOR NATIONAL UNIFORMITY

The Ninth Circuit opinion states plainly — and wrongly — that it is competent for a state to have a remedy for a cargo damage matter that is not in conformity with federal law. It states that "... the core of the tortious bad faith claim, however, is that the alleged [claims processing] of the appellees constituted a breach of this *state-law* duty to handle the contract claim in good faith. * * * ... The acts [complained of] would, we think, constitute torts even in the absence of a Carmack Amendment dispute." 746 F.2d at 645. It is a bromide, oft repeated, that Congress preempts fields of law and preempts the creation of rights and remedies where there is a pressing need for national uni-

Supreme Court, U.S.
FILED
MAY 8 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-1559

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1984

UNITED VAN LINES, INC.,
Petitioner

vs.

JAMES K.T. HUNTER and
GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI

GROVER A. PERRIGUE, III
JAMES CLARK LEECH
JANICE E. HARDIN
3452 East Foothill Boulevard
Suite 400
Pasadena, California 91107
(818) 449-1732

Attorneys for Petitioner.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

No. 84-1559

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1984

UNITED VAN LINES, INC.,
Petitioner

VS.

JAMES K.T. HUNTER and
GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI

United's petition was filed on March 29, 1985. On April 16, 1985, this Court decided *Allis-Chalmers Corporation v. Roderick S. Loueck* (No. 83-1748). It seems obvious that *Allis-Chalmers* compels reversal of the Ninth Circuit in the case at bar.

In *"Hunter II"*, the Ninth Circuit used the rationale of independent state bad faith tort theory to justify its conclusion that the Hunter case did not arise under 28 U.S.C. 1337 and also to reject federal preemption. This rationale resulted in the Ninth Circuit determining that a $5,000,000

so-called "state" claim against United for the alleged bad faith claims adjusting did not arise under an act of Congress regulating commerce within the meaning of 28 U.S.C. 1337. The Ninth Circuit decision appealed from here clearly contradicts this Court's decision in *Allis-Chalmers*, and *Hunter II* should accordingly be reversed.

Respectfully submitted,

GROVER A. PERRIGUE, III
JAMES CLARK LEECH
JANICE E. HARDIN

By: GROVER A. PERRIGUE, III
Attorneys for Petitioner

MOTION FILED
JUN 14 1985

(5)

No. 84-1559

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

UNITED VAN LINES, INC.,
Petitioner,
v.
JAMES K. T. HUNTER
and
GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN MOVERS CONFERENCE AS *AMICUS CURIAE*

JAMES A. CALDERWOOD *
JOSEPH MICHAEL ROBERTS
ROBERT R. HARRIS
GROVE, JASKIEWICZ, GILLIAM and COBERT
1730 M Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-2900
Counsel for Amicus Curiae American Movers Conference

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1559

UNITED VAN LINES, INC.,
Petitioner,

v.

JAMES K. T. HUNTER

and

GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF AMERICAN MOVERS CONFERENCE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Movers Conference (hereinafter "AMC") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petition For Writ of Certiorari of United Van Lines, Inc. The consent of the respondents was refused. AMC has not been a participant in this case prior to this filing as *amicus curiae.*

The AMC is the national trade association for the household goods moving industry. Most of its members are common carriers providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Subchapter II of Chapter 105 of Title 49 United States Code. As such, these household goods common carriers and the AMC, as their trade association,

are directly affected by decisions of the courts which interpret the scope of the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11916 (1982), particularly the standard of liability for common carriers providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission, as set forth in section 11707.

If the decision of the United States Court of Appeals for the Ninth Circuit is not reversed, then the household goods common carriers regulated by the Interstate Commerce Commission will be subject to conflicting interpretations of the scope of section 11707 and, most importantly, will be subject to the diverse and sometimes conflicting laws of the various states in the performance of their federally regulated transportation obligations. In addition, if the decision of the Ninth Circuit is not reversed, access to the federal courts by both shippers and carriers will be restricted beyond the intentions of Congress and this Court.

The Ninth Circuit violated clear standards set forth in previous decisions of this Court by restricting the scope of liability imposed on federally regulated common carriers by section 11707 to only physical damage to the cargo transported. This decision, if not reversed, will be binding precedent upon many shippers and carriers, many of whom are AMC members, who seek the protection and uniform application of the liability standard of section 11707.

The Ninth Circuit also failed to address whether independent federal subject matter jurisdiction exists when a plaintiff alleges a cause of action based upon 49 U.S.C. § 11711. Since a federal court, at any time, may consider the existence of federal subject matter jurisdiction, this issue should be resolved by this Court, notwithstanding the apparent failure of the courts and parties below specifically to address or resolve the issue.

These issues are of very real importance to the questions involved and therefore to all household goods carriers subject to the Revised Interstate Commerce Act. The interests of justice would not be served unless these legal issues were considered by this Court because their impact is far-reaching.

Accordingly, it is respectfully requested that leave to file the attached brief *amicus curiae* on behalf of the AMC be granted.

Respectfully submitted,

JAMES A. CALDERWOOD *
JOSEPH MICHAEL ROBERTS
ROBERT R. HARRIS
GROVE, JASKIEWICZ, GILLIAM
and COBERT
1730 M Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-2900
Counsel for Amicus Curiae
American Movers Conference

* Counsel of Record

Date: June 14, 1985

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	2
I. The United States Court of Appeals for the Ninth Circuit Violated Clear Standards of This Court By Holding That Section 11707 Imposes Liability On a Federally Regulated Common Carrier Only to the Extent of the Physical Damage to the Cargo Shipped Under the Bill of Lading	2
A. The Liability Imposed Upon Federally Regulated Common Carriers By Section 11707 Preempts All State and Common Law Actions Which are Inconsistent With Section 11707	3
B. In Light of the Virtually Complete Preemption of State and Common Law Claims By Section 11707, A Reviewing Court Must Address Each and Every Claim for Relief Asserted by Plaintiffs to Determine Whether They Arise Under Section 11707	7
II. The District Court Had Independent Removal Jurisdiction Over the Complaint Based Upon Section 11711	13
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Adams Express Co. v. Croninger, 226 U.S. 491 (1913) 3, 4, 6
Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985) 2, 3, 16
American Synthetic Rubber Corp. v. Louisville & N.R.R., 422 F.2d 462 (6th Cir. 1970) 8
American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) 14
Bell v. Hood, 327 U.S. 678 (1946) 15
F. J. McCarty Co. v. Southern Pacific Co., 428 F.2d 690 (9th Cir. 1970) 11
Fulton v. Chicago, R.I. & P.R.R., 481 F.2d 326 (8th Cir. 1973) 8
George R. Hall, Inc. v. Superior Trucking, Inc., 514 F. Supp. 581 (N.D. Ga. 1981) 8
Georgia, F., & A. Ry. v. Blish Milling Co., 241 U.S. 189 (1916) 8
Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903) 10
Gully v. First National Bank, 299 U.S. 109 (1936) .. 15
Hector Martinez and Co. v. Southern Pacific Transportation Co., 606 F.2d 106 (5th Cir. 1979) 11
J. & H. Flyer, Inc. v. Pennsylvania Railroad, 316 F.2d 203 (2d Cir. 1963) 11
Kansas City Southern Railway v. Carl, 227 U.S. 639 (1913) 6
L.E. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F.2d 488 (10th Cir. 1964) 11
New York, Philadelphia, & Norfolk R.R. v. Peninsula Produce Exchange of Maryland, 240 U.S. 34 (1916) 6
Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 14
Pennsylvania R.R. v. Hughes, 191 U.S. 477 (1903) .. 4
Reed v. Lambert, 674 F.2d 1032 (5th Cir. 1982) .. 15
Rules, Regulations, and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515 (1972) 12

TABLE OF AUTHORITIES—Continued

	Page
Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936)	8
Southern Express Co. v. Byers, 240 U.S. 612 (1916)	7, 10
The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913)	14
Acts and Statutes:	
Act of October 17, 1978, Pub. L. 95-473, § 3(a), 92 Stat. 1337	4
Hepburn Rate Act of 1906, ch. 3591, § 7, 34 Stat. 595	2
Labor Management Relations Act of 1947, ch. 120, § 301, 61 Stat. 156	2
Revised Interstate Commerce Act, 49 United States Code §§ 10101-11916 (1982)	1, 2, 10
28 United States Code § 1331 (1982)	14
28 United States Code § 1337 (1982)	2, 13, 14
28 United States Code § 1441 (1982)	3, 14
49 United States Code § 20(11)	2, 4
49 United States Code § 11707 (1982)	*passim*
49 United States Code § 11711 (1982)	13, 14, 16
Regulations:	
49 C.F.R. § 1005 (1984)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1559

UNITED VAN LINES, INC.,
Petitioner,

v.

JAMES K. T. HUNTER

and

GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMERICAN MOVERS CONFERENCE AS *AMICUS CURIAE*

American Movers Conference, as *amicus curiae*, supports the position of United Van Lines, Inc., petitioner.

STATEMENT

The American Movers Conference is the national trade association for the household goods moving industry. Most of its member motor carriers possess operating authority from the Interstate Commerce Commission to engage in the interstate transportation of household goods as motor common carriers. As such, these carriers are subject to the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11916 (1982), and are regulated by the Interstate Commerce Commission. In particular, these carriers are subject to the liability standard established by Congress and currently codified at 49 U.S.C. § 11707

(1982).[1] The uniform interpretation and application of the liability standard in section 11707 is of utmost significance to these carriers. Moreover, these carriers consider it of great important to have available to them the jurisdiction of the federal courts in disputes where the scope of liability of these carriers under section 11707 and other provisions of the Revised Interstate Commerce Act are at issue.

The AMC has not been a participant in this case prior to this filing as *amicus curiae*.

ARGUMENT

I. The United States Court of Appeals for the Ninth Circuit Violated Clear Standards of This Court By Holding That Section 11707 Imposes Liability on a Federally Regulated Common Carrier Only to the Extent of the Physical Damage to the Cargo Shipped Under the Bill of Lading.

Under the guise of considering the effect of the $10,000 jurisdictional minimum established at 28 U.S.C. § 1337(a) (1982) for actions brought under section 11707, the Ninth Circuit engaged in a lengthy and detailed discussion of the scope of the doctrines of federal preemption,[2] artful pleading, pendant jurisdiction and

---

[1] Congress first enacted a statute governing the liability of federally regulated common carriers in 1906. Hepburn Rate Act of 1906, ch. 3591, § 7, 34 Stat. 595 (originally codified at 49 U.S.C. § 20(11), recodified without substantial changes at 49 U.S.C. § 11707 (1982)). This provision is commonly referred to as the "Carmack Amendment."

[2] This Court very recently applied the federal preemption doctrine in determining whether the tort of bad faith handling of insurance claims, recognized by Wisconsin state courts, was preempted by a federal claim arising under section 301 of the Labor Management Relations Act of 1947, ch. 120, § 301, 61 Stat. 156 (codified at 29 U.S.C. § 185(a) (1982)). Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985) (hereinafter *Allis Chalmers*). The Ninth Circuit did not have the benefit of this decision.

aggregation of claims. However, the court overlooked critical factors in deciding that the jurisdictional minimum was not satisfied.

The Ninth Circuit too quickly determined that the plaintiffs' claim for damages arising under section 11707 was limited to approximately $2,500 in cargo damages. The second major error of the Ninth Circuit was in considering the remaining causes of action of the plaintiffs to be "state claims." A review of the Complaint will show that they were not necessarily state claims, nor did the plaintiffs even allege that they were state claims. The Ninth Circuit should have more thoroughly addressed the origins of each claim for relief. The claims for relief which are properly attributed to a cause of action arising under section 11707 satisfactorily meet the $10,000 jurisdictional minimum. As such, the District Court properly had removal jurisdiction of the Complaint under 28 U.S.C. § 1441(a) (1982).[3]

A. The Liability Imposed Upon Federally Regulated Common Carriers By Section 11707 Preempts All State and Common Law Actions Which Are Inconsistent With Section 11707.

Congress has preempted all state and common law causes of action which come within the parameters of the liability regimen established in section 11707.[4] This liability regimen was first imposed by Congress upon federally regulated common carriers in 1906.[5] Prior to

---

[3] AMC presumes that the lower courts will, upon remand, determine which claims arise under section 11707 and which claims do not. Once that determination is made, then the lower courts can determine, in light of this Court's decision in *Allis Chalmers*, whether the non-section 11707 claims are preempted. The issues addressed by AMC relate exclusively to whether the district court had removal jurisdiction to entertain the suit.

[4] Adams Express Co. v. Croninger, 226 U.S. 491 (1913).

[5] *See supra* note 1 and accompanying text.

that time, such carriers were subject to the various and disparate policies and statutes of the states.[6] However, once the Carmack Amendment was enacted, the states' authority over the liability of interstate carriers ended. This Court has extensively treated the preemption of state authority over common carrier liability, noting:

> That the [1906] legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist.

Adams Express Co. v. Croninger, 226 U.S. 491, 505-06 (1913).

The next question logically is what liabilities are imposed upon common carriers by the Carmack Amendment. The original statute[7] (49 U.S.C. § 20(11)) stated

---

[6] *See, e.g.*, Pennsylvania R.R. v. Hughes, 191 U.S. 477 (1903).

[7] The language of section 11707 is slightly different than the language which was contained in the original statute and codified at section 20(11). Section 11707 states that the liability imposed is for "the actual loss or injury to the property." Section 20(11) stated that the liability imposed was for "any loss, damage, or injury to such property." Section 3(a) of Pub. L. 95-473, 92 Stat. 1337 (1978), provided that in recodifying the provisions of the Interstate Commerce Act, including section 20(11), no substantive change in those provisions was intended by the recodification. The recodification substituted the word "injury" for "damage, or

that the subject carrier "shall be liable to the lawful holder [of the bill of lading] for any loss, damage, or injury to such property [received by the carrier and] caused by it or by any common carrier [transporting the property]." In *Hunter II*, the Ninth Circuit held that section 11707 liability extended only to damage to the cargo transported. *See* Appendix A-9 and A-30 to Petition for Writ of Certiorari of United Van Lines, Inc. (United).[8] The remaining damages alleged by the plaintiffs were held by the Ninth Circuit to arise under "state claims" [9] and not under section 11707. These holdings are in clear violation of interpretations of this Court and other courts as to the scope of damages available to injured parties under section 11707. Properly interpreted, most, if not all, of the damages alleged by plaintiffs arise under section 11707 and their amount exceeds the $10,000 jurisdictional minimum.

In enacting the Carmack Amendment, Congress did not establish a new liability regimen for common carriers:

> In speaking of the "liability" imposed by the [Carmack Amendment], we said, in the Croninger Case, that "the statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to

---

injury" as being more inclusive. Since the decisions of this Court interpreting the scope of the Carmack Amendment discuss section 20(11), AMC is setting forth the language of section 20(11), rather than section 11707, in the text.

[8] All references to appendices in this brief are to the appendices contained in United's Petition for Writ of Certiorari and will be identified as "Appendix ——-——."

[9] As noted above, *see supra* text accompanying note 3, the plaintiffs' Complaint did not characterize these claims for relief as arising under state statutes, state common law, federal common law or federal statutes.

> carriers has been interpreted by this court as well as many courts of the states."

Kansas City Southern Railway v. Carl, 227 U.S. 639, 649 (1913). This Court previously noted in *Croninger*:

> The duty to issue a bill of lading, and the liability thereby assumed, are covered in full . . .
>
> . . . The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered;" and plainly implies a liability for some default in its common-law duty as a common carrier.
>
> . . . .
>
> . . . The rule of the common law did not limit [a common carrier's] liability to loss or damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy.

226 U.S. at 506, 509. Recovery for physical cargo damage is not the exclusive remedy available under the Carmack Amendment. In *New York, Philadelphia, & Norfolk Railroad v. Peninsula Produce Exchange of Maryland*, 240 U.S. 34, 38 (1916), this Court held that a shipper could recover for business losses suffered by mere delay to the shipment and stated:

> The words "any loss, damage, or injury to such property," caused by the initial carrier or by any connecting carrier, are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural, in view of the general purpose of the statute, to take the words "to the property" as limiting the word "damage" as well as the word "injury" and thus rendering the former wholly superfluous.

Clearly, the liability imposed by section 11707 extends to all loss, damage, or injury which is caused by a fail-

ure of the carrier to perform the obligations arising under the bill of lading and imposed by the common law due to its nature as a common carrier. This rule is evident from this Court's discussion in *Southern Express Co. v. Byers*, 240 U.S. 612 (1916). Interpreting the scope of the Carmack Amendment, this Court noted:

> Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common-law principles accepted and enforced by the Federal courts.
>
> . . . .
>
> The action is based upon a claim of mental suffering only,—nothing else was set up and the proof discloses no other injury for which compensation has not been made. In such circumstances as those presented here, the long-recognized common-law rule permitted no recovery; the decisions to this effect "rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation." Cooley, Torts 3d ed. page 94. The lower Federal courts, almost without exception, have adhered to this doctrine, and in doing so we think they were clearly right upon principle and also in accord with the great weight of authority.

240 U.S. at 614-5. The Court adhered to the Federal rule denying recovery for mental pain without proof of other injury, although it noted that the states had split widely on this issue. *Id.* at 616.

B. In Light of the Virtually Complete Preemption of State and Common Law Claims by Section 11707, A Reviewing Court Must Address Each and Every Claim for Relief Asserted by Plaintiffs to Determine Whether They Arise Under Section 11707.

The Ninth Circuit did not analyze correctly whether the jurisdictional minimum was met by plaintiffs' Complaint. The clear standards of this Court require a re-

viewing court to address each claim for relief to determine whether it arises in connection with section 11707, the bill of lading and common law principles of common carrier liability.[10] The reviewing court should not accept at face value the designation by plaintiff of the statutory or common law basis for the cause of action, but instead should independently assess the cause of action. In this instance, the court noted the plaintiffs did not characterize their claims as arising under section 11707 and apparently accepted the plaintiffs' arguments on appeal that their intentions were to base the claims upon California law. This was the mistake of the Ninth Circuit. While a plaintiff normally may have the option of selecting his remedy and being the "master of his complaint," that option is nonexistent if the claim arises under section 11707. In that instance, he has no state remedy and he is enslaved to his federal remedy. An independent review of plaintiffs' Complaint clearly shows that several, if not all, of the claims for relief arise under section 11707.

The Complaint filed by the plaintiffs leaves much to be desired in terms of brevity and clarity in its claims for relief. Ignoring the titles placed by plaintiffs upon their claims, they can be described as follows. First, plaintiffs request relief for the actual value of the damage done to the household goods and antiques which were the subject of the transportation by United. Plaintiffs put a value "in excess of $2,500" for this damage. They seek

---

[10] *See* Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936); Georgia, F., & A. Ry. v. Blish Milling Co., 241 U.S. 189 (1916) (shipper sued only in trover; court held shipper's exclusive remedy was under Carmack Amendment). *See also* American Synthetic Rubber Corp. v. Louisville & N.R.R., 422 F.2d 462 (6th Cir. 1970); Fulton v. Chicago, R.I. & P.R.R., 481 F.2d 326 (8th Cir. 1973); George R. Hall, Inc. v. Superior Trucking, Inc., 514 F. Supp. 581 (N.D. Ga. 1981). This function is all the more appropriate when, as in this case, the plaintiffs did not specify in their Complaint whether their claims arose under state or federal law.

relief against United for this damage because of United's alleged breach of its obligations to plaintiffs under the contract and section 11707. *See* Paragraphs 22-23 of the Complaint (Appendix L-8).

Second, plaintiffs seek $50,000 as damages for the emotional distress allegedly caused by United (and its employees and agents) to Ms. Brandt in damaging an antique brass baby crib when United supposedly knew, prior to the transportation of the crib, that Ms. Brandt was pregnant and was extremely anxious that the crib arrive at destination without injury. *See* Paragraph 30(b) (Appendix L-18). The basis for this second claim for relief, according to plaintiffs, is that United breached the covenant of good faith and fair dealing which was implied in the bill of lading. *See* Paragraph 28 (Appendix L-9).

The third item of damage alleged by plaintiffs is identified as "in excess of $3,000," and represents the attorney's fees which the plaintiffs had expended, prior to filing the Complaint, in seeking payment for the damage done to the household goods. *See* Paragraph 30(c) (Appendix L-18). The basis for this damage, according to plaintiffs, is United's breach of the covenant of good faith and fair dealing which is implied in the bill of lading. *See* Paragraph 28 (Appendix L-9).

The fourth item of damages sought by plaintiffs relates to punitive damages against United in the amount of $5,000,000.00. *See* Paragraph 31 (Appendix L-18 and 19). These damages are sought due to an alleged breach of the covenant of good faith and fair dealing implied in the bill of lading, which breach was purportedly committed with a conscious disregard of the rights of plaintiffs by means of intentional misrepresentations, deceits and concealments of material facts allegedly known to United, with the intention of thereby depriving plaintiffs of their legal rights. *Id.*

Plaintiffs further alleged that all of the damages set forth above (except attorney's fees) were separately caused by certain fraudulent and false misrepresentations of United (or its agents or employees) relating to the services and benefits which plaintiffs were to receive by payment of a specific tariff rate. *See* Paragraphs 35-41 (Appendix L-20-22).

Fifth, plaintiffs alleged that they suffered emotional harm in the amount of $50,000.00, and requested similar punitive damages, due to the defendants' outrageous, oppressive, fraudulent and malicious actions in settling the filed claim of plaintiffs. *See* Paragraph 42-46 (Appendix L-22-25).

Each claim of plaintiffs is in connection with a duty or obligation which United owes to plaintiffs as a result of the bill of lading, its common law common carrier obligation, section 11707 and regulations of the Interstate Commerce Commission imposed on carriers under authority delegated to it by Congress in the Revised Interstate Commerce Act. As a result, each and every claim for relief of plaintiffs arise under section 11707.[11]

Plaintiffs' second allegation of damage, emotional harm to Ms. Brandt, is simply special damages available under the bill of lading. The law on special contract damages is settled, this Court having declared that "a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract." *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903). This rule of reasonable foreseeability has been applied by many courts in assessing damages based upon

---

[11] A separate question for the lower court is whether federal law authorizes the relief which plaintiffs request. *See* Southern Express Co. v. Byers, 240 U.S. 612 (1916). However, this issue sh d be addressed after the court makes the determination whether the relief requested arises under breaches of common carrier duties imposed by section 11707, the bill of lading and federal common law.

section 11707. The Fifth Circuit, in considering whether special damages should be assessed against a common carrier for failure to perform the obligation under the bill of lading, held that federal law controls its determination of liability and the measure of damages, although federal law adopts common law principles. *See Hector Martinez and Co. v. Southern Pacific Transportation Co.*, 606 F.2d 106, 108 (5th Cir. 1979). *See also F.J. McCarty Co. v. Southern Pacific Co.*, 428 F.2d 690, 693 (9th Cir. 1970); *L.E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F.2d 488, 491 (10th Cir. 1964); *J. & H. Flyer, Inc. v. Pennsylvania Railroad*, 316 F.2d 203, 205 (2d Cir. 1963). Since the plaintiffs have alleged that the emotional harm suffered by Ms. Brandt was a result of United's breach of the covenant of good faith and fair dealing contained within the bill of lading, ordinary rules of contract interpretation relating to special damages should apply. Clearly, the $50,000.00 emotional distress allegedly caused to Ms. Brandt comes within the purview of special damages available under section 11707.

The damages allegedly suffered by plaintiffs pursuant to "bad faith" settlement by United also arise under section 11707. The contract which plaintiffs and United signed is commonly referred to as the Uniform Household Goods Bill of Lading. The applicable terms of the bill of lading have been included as Appendix M of United's Petition for Writ of Certiorari. The bill of lading contains the conditions, rights, duties and obligations of both parties in filing, processing and satisfying claims which relate to the transportation of goods covered by the bill of lading. Not only are these obligations of United extensively covered in the bill of lading, they are imposed upon United by the Interstate Commerce Commission.[12] The Commission assumed jurisdiction over procedures for claims and claims processing based upon its delegated au-

---

[12] *See* 49 C.F.R. § 1005 (1984).

thority from Congress to regulate interstate transportation. The Commission has held:

> Claims arise in and out of the performance of the transportation service provided by carriers, and the fact that most or all of the paper work related thereto and the formal demand for recompense follows delivery is of no consequence. It is the misfeasance or nonfeasance in the actual performance by carriers of the transportation service that usually gives birth to claims for loss and damage, and the tendency of carriers to think that it is otherwise should, we think, immediately be arrested.
>
> As seen then, the processing of loss and damage claims constitutes an integral part of the total shipping and transportation service concerning which carriers should, under section 1(6) of the act and similar provisions in parts II, III, and IV of the act, establish reasonable regulations and practices. In view of this, and because the expeditious and just processing of loss and damage claims is essential to carrying out the national transportation policy to foster adequate, efficient, and economical transportation service, this Commission has the necessary jurisdiction and authority—and on the strength of this record, the conspicuous duty—to make and enforce regulations pertaining to the processing of loss and damage claims in addition to those which we have promulgated in the past.

Rules, Regulations, and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515, 545-46 (1972). The procedures set forth in the bill of lading relating to the filing, processing and satisfaction of claims are the identical procedures which the Interstate Commerce Commission has imposed upon all regulated common carriers. Therefore claims for relief based upon improper or fraudulent settlement actions by United are based upon breaches of obligations arising from the bill of lading and federal regulations. These breaches, whether or not intentional,

willful or malicious, cannot be disassociated from the bill of lading. As such, any consequential or special damages arising from "bad faith" settlement actions are clearly within the scope of section 11707.

The intentional, willful or malicious nature of the breach by United of these obligations is the basis for the punitive damages claim of plaintiffs. It will be a question for the lower courts whether punitive damages based upon a willful or malicious breach of contractual obligations are recoverable under federal law. For purposes of establishing the district court's removal jurisdiction, it is sufficient that the punitive damages are requested because of breaches of obligations arising under section 11707. In addition, the availability of punitive damages need not be addressed at this point due to the clear allegation of consequential and special damages arising from the breach by United of its obligations under section 11707 and the bill of lading. These consequential and special damages satisfy the $10,000 jurisdictional minimum set forth at 28 U.S.C. § 1337(a) for civil actions brought under section 11707.

II. The District Court Had Independent Removal Jurisdiction Over the Complaint Based Upon Section 11711.

Plaintiffs' sixth cause of action was brought under 49 U.S.C. § 11711 (1982). *See* Paragraphs 47-49 (Appendix L-25). This section provides shippers of household goods a federally guaranteed right to recover from motor carriers, in certain circumstances, attorney's fees which are incurred in a dispute concerning the transportation of household goods. Plaintiffs asserted this right as a separate cause of action in the Complaint and not merely as an adjunct to the remaining causes of action. Plaintiffs, therefore, have asserted a cause of action arising under a specific federal law. Whether this claim arises under an act of Congress regulating commerce or a law of the United States, federal jurisdiction exists independ-

ent of any claim under section 11707. *See* 28 U.S.C. § 1337(a); 28 U.S.C. § 1331.

As the Ninth Circuit observed, *see* Appendix A-13, this Court has long held:

> the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a "suit arising under" the patent or other law of the United States by his declaration or bill.

The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913). Plaintiffs' assertion of a federal claim, therefore, gave the District Court original jurisdiction under either 28 U.S.C. § 1331 or § 1337 and, consequently, removal jurisdiction under 28 U.S.C. § 1441(a), without any regard to the amount of damages. This jurisdictional ground is independent of section 11707 and is not affected by the $10,000.00 jurisdictional minimum which applies only to causes of action arising under section 11707. In short, there is no jurisdictional minimum for section 11711 causes of action.

Whether 49 U.S.C. § 11711 in fact creates a cause of action under which relief may be granted may be open to dispute. As alleged, it does satisfy the tests this Court has previously employed to determine the existence of cases arising under federal laws. The "title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). If plaintiffs proved each of their allegations incorporated in the sixth cause of action, they would also satisfy the creation test for federal causes of action in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916). Under the American rule concerning recovery of attorney's fees, the federal statute obviously is both basic and necessary to recovering the attorney's fees re-

quested and the claim clearly "hinges on" federal law. *Gully v. First National Bank*, 299 U.S. 109 (1936).

Whether plaintiffs would ever succeed on their sixth claim, or even whether such a cause of action exists, need not have concerned the Ninth Circuit or the District Court in deciding whether jurisdiction existed. This Court has held "where the Complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit." [13] *Bell v. Hood*, 327 U.S. 678, 681-82 (1946).

---

[13] The Court recognized only two exceptions. The first, a federal claim made solely for the purpose of obtaining federal jurisdiction, is completely inapplicable here because plaintiffs originally filed in state court. The other, the insubstantiality or frivolity of a claim, although never argued below, does not apply. Because plaintiffs alleged a nonfrivolous claim--that they were entitled to attorney's fees under 49 U.S.C. § 11711—the District Court had removal jurisdiction to consider the claim. Failure to state a proper cause of action would call for a judgment on the pleadings or merits after the court assumed jurisdiction, not a dismissal for want of jurisdiction. Bell v. Hood, 327 U.S. 678, 682 (1946); Reed v. Lambert, 674 F.2d 1032, 1035-36 (5th Cir. 1982).

CONCLUSION

This Court should grant the Petition For Writ of Certiorari, reverse the judgment of the Court of Appeals and remand the case with instructions that the court (1) determine which of the claims for relief asserted in the Complaint arise under section 11707, (2) if the $10,000 jurisdictional minimum for section 11707 is met, apply the preemption standard announced in *Allis Chalmers* to determine whether any non-section 11707 claims are preempted by section 11707, and (3) determine whether independent subject matter jurisdiction exists under 49 U.S.C. § 11711.

Respectfully submitted,

JAMES A. CALDERWOOD *
JOSEPH MICHAEL ROBERTS
ROBERT R. HARRIS
GROVE, JASKIEWICZ, GILLIAM
and COBERT
1730 M Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-2900
Counsel for Amicus Curiae
American Movers Conference

* Counsel of Record

Date: June 14, 1985